185 P ✓

MONTANA LEGISLATIVE HISTORY

Chapter 687 19 91

Bill H 451 S _____ Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Feb 13	✓ C	Hearing Date(s)	Mar 28	✓ C
	Feb 16	✓ C		Apr 03	✓ C
		C			C
		C			C
Date Out	Feb 18	✓ C		Apr 03	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

Note: A Free Conference Committee was appointed. Its minutes are unpublished, but the report is included here.

HB 450 INTRODUCED BY HARPER, ET AL.
REVISE LOBBYING ENFORCEMENT; PROVIDE FOR ISSUANCE OF ORDERS OF NONCOMPLIANCE
BY REQUEST OF COMMISSIONER OF POLITICAL PRACTICES

1/30	INTRODUCED		
1/30	REFERRED TO STATE ADMINISTRATION		
1/30	FIRST READING		
1/30	FISCAL NOTE REQUESTED		
2/04	FISCAL NOTE RECEIVED		
2/04	FISCAL NOTE PRINTED		
2/08	HEARING		
2/11	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/13	2ND READING PASSED AS AMENDED	99	0
2/15	3RD READING PASSED	95	2
	TRANSMITTED TO SENATE		
2/16	FIRST READING		
2/16	REFERRED TO STATE ADMINISTRATION		
3/06	HEARING		
3/06	COMMITTEE REPORT—BILL CONCURRED		
3/08	2ND READING CONCURRED	49	0
3/09	3RD READING CONCURRED	46	2
	RETURNED TO HOUSE		
3/14	SIGNED BY SPEAKER		
3/14	SIGNED BY PRESIDENT		
3/15	TRANSMITTED TO GOVERNOR		
3/20	SIGNED BY GOVERNOR		

CHAPTER NUMBER 91 EFFECTIVE DATE: 10/01/91

HB 451 INTRODUCED BY BROOKE, ET AL.
REVISE SEXUAL CRIMES

1/30	INTRODUCED		
1/30	REFERRED TO JUDICIARY		
1/30	FIRST READING		
2/13	HEARING		
2/19	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/25	2ND READING PASSED AS AMENDED	74	26
2/26	3RD READING PASSED	76	24
	TRANSMITTED TO SENATE		
2/26	FIRST READING		
2/26	REFERRED TO JUDICIARY		
3/28	HEARING		
4/03	COMMITTEE REPORT—BILL CONCURRED		
4/05	2ND READING CONCURRED AS AMENDED	50	0
4/06	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/09	2ND READING AMENDMENTS NOT CONCURRED	89	7
4/11	FREE CONFERENCE COMMITTEE APPOINTED		
4/19	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/20	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	87	11
4/22	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	85	11
	SENATE		
4/16	FREE CONFERENCE COMMITTEE APPOINTED		
4/19	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/20	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	49	0
4/22	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	48	0

4/25	SIGNED BY SPEAKER		
4/25	SIGNED BY PRESIDENT		
4/25	TRANSMITTED TO GOVERNOR		
4/27	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 687	EFFECTIVE DATE: 4/27/91	

HB 452 INTRODUCED BY LARSON, ET AL.

PROVIDE 7-YEAR TAXABLE VALUE DECREASE FOR CERTAIN NEW AND EXPANDING INDUSTRIES

1/30	INTRODUCED		
1/30	REFERRED TO TAXATION		
1/30	FIRST READING		
2/08	HEARING		
3/27	COMMITTEE REPORT—BILL PASSED AS AMENDED		
4/03	2ND READING PASSED	94	5
4/03	ON MOTION RULES SUSPENDED TO ALLOW 3RD READING THIS DAY		
4/03	3RD READING PASSED	96	4
	TRANSMITTED TO SENATE		
4/04	FIRST READING		
4/04	REFERRED TO TAXATION		
4/09	HEARING		
4/12	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
4/15	2ND READING CONCURRED	48	0
4/16	3RD READING CONCURRED	49	0
	RETURNED TO HOUSE WITH AMENDMENTS		
4/18	2ND READING AMENDMENTS NOT CONCURRED	97	0
4/19	FREE CONFERENCE COMMITTEE APPOINTED		
4/22	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/22	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	92	1
4/23	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	93	0
	SENATE		
4/20	FREE CONFERENCE COMMITTEE APPOINTED		
4/22	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/23	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	49	0
4/24	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	48	0
5/03	SIGNED BY SPEAKER		
5/03	SIGNED BY PRESIDENT		
5/03	TRANSMITTED TO GOVERNOR		
5/17	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 786	EFFECTIVE DATE: 5/17/91	

HB 453 INTRODUCED BY FAGG, ET AL.

REQUIRE A PUBLIC EMPLOYER TO PICK UP A MEMBER'S CONTRIBUTION UNDER THE MONTANA JUDGES' RETIREMENT SYSTEM

1/30	INTRODUCED		
1/30	REFERRED TO LABOR & EMPLOYMENT RELATIONS		
1/30	FIRST READING		
1/30	FISCAL NOTE REQUESTED		
2/04	FISCAL NOTE RECEIVED		
2/06	FISCAL NOTE PRINTED		
2/07	HEARING		
2/08	COMMITTEE REPORT—BILL PASSED		
2/11	2ND READING PASSED	94	5
2/13	3RD READING PASSED	97	3

HOUSE BILL NO. 451

INTRODUCED BY BROOKE, YELLOWTAIL, HANSEN, COCCHIARELLA, J. BROWN, JACOBSON, STRIZICH, WYATT, COHEN, DARKO, BARNHART, REAM, FRITZ, O'KEEFE, DRISCOLL, BECKER, SCHYE, D. BROWN, BRADLEY, WANZENRIED, TOOLE, CONNELLY

IN THE HOUSE

JANUARY 30, 1991	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
	FIRST READING.
FEBRUARY 19, 1991	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 20, 1991	PRINTING REPORT.
FEBRUARY 25, 1991	SECOND READING, DO PASS AS AMENDED.
FEBRUARY 26, 1991	ENGROSSING REPORT.
	THIRD READING, PASSED. AYES, 76; NOES, 24.
	TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 26, 1991	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
	FIRST READING.
APRIL 3, 1991	COMMITTEE RECOMMEND BILL BE CONCURRED IN. REPORT ADOPTED.
APRIL 5, 1991	SECOND READING, CONCURRED IN AS AMENDED.
APRIL 6, 1991	THIRD READING, CONCURRED IN. AYES, 49; NOES, 0.
	RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

APRIL 9, 1991	SECOND READING, AMENDMENTS NOT CONCURRED IN.

APRIL 11, 1991	ON MOTION, FREE CONFERENCE COMMITTEE REQUESTED AND APPOINTED.
	IN THE SENATE
APRIL 16, 1991	ON MOTION, FREE CONFERENCE COMMITTEE REQUESTED AND APPOINTED.
	IN THE HOUSE
APRIL 19, 1991	FREE CONFERENCE COMMITTEE REPORTED.
APRIL 20, 1991	SECOND READING, FREE CONFERENCE COMMITTEE REPORT ADOPTED.
APRIL 22, 1991	THIRD READING, FREE CONFERENCE COMMITTEE REPORT ADOPTED.
	IN THE SENATE
APRIL 22, 1991	FREE CONFERENCE COMMITTEE REPORT ADOPTED.
	IN THE HOUSE
APRIL 23, 1991	RECEIVED FROM SENATE.
	SENT TO ENROLLING.
	REPORTED CORRECTLY ENROLLED.

House BILL NO. 451

INTRODUCED BY Brasle Yellowtail Steed Jones Hopgen Cael Mangan D Brown Jurdon Clark Bennett Hearn Zuk Rice Ingraham Becker Lehman Bradley Kennedy

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAWS RELATING TO SEXUAL CRIMES; DEFINING FORCE FOR PURPOSES OF SEXUAL INTERCOURSE WITHOUT CONSENT; REMOVING SPOUSAL EXEMPTIONS; INCREASING PENALTIES; REPEALING THE CRIME OF DEVIATE SEXUAL CONDUCT; AMENDING SECTIONS 27-2-216, 45-1-205, 45-2-101, 45-2-103, 45-2-104, 45-5-501, 45-5-502, 45-5-503, 45-5-504, 45-5-507, 45-5-511, 46-15-401, 46-18-111, 46-18-201, 46-23-502, 50-20-109, AND 61-5-405, MCA; REPEALING SECTION 45-5-505, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 45-5-501, MCA, is amended to read:

"45-5-501. Definition. (1) As used in 45-5-503 and 45-5-505, the term "without consent" means:

~~(1)~~(a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or

~~(2)~~(b) the victim is incapable of consent because he is:

~~(a)~~(i) mentally defective or incapacitated;

~~(b)~~(ii) physically helpless; or

~~(c)~~(iii) less than 16 years old.

(2) As used in subsection (1), "force" means:

(a) the infliction, attempted infliction, or threatened infliction by the offender of bodily injury or commission or threat of any other crime by the offender against the victim or another that causes the victim to reasonably believe that the offender has the present ability to execute the threat; or

(b) the threat of retaliatory action by the offender against the victim or another that causes the victim to reasonably believe that the offender has the ability to execute the threat."

Section 2. Section 45-5-502, MCA, is amended to read:

"45-5-502. Sexual assault. (1) A person who knowingly subjects another ~~not--his--spouse~~ to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.

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(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim."

Section 3. Section 45-5-503, MCA, is amended to read:

"**45-5-503. Sexual intercourse without consent.** (1) A person who knowingly has sexual intercourse without consent with ~~a person of the opposite sex~~ another commits the offense of sexual intercourse without consent. A person may not be convicted under this section based on the age of his spouse as provided in 45-5-501~~(2)(c)~~ (1)(b)(iii).

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, except as provided in 46-18-222.

(3) (a) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-222.

(b) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

(4) In addition to any sentence imposed under subsection (2) or (3), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244."

Section 4. Section 45-5-504, MCA, is amended to read:

"**45-5-504. Indecent exposure.** (1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person ~~other than his spouse~~, exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both."

Section 5. Section 45-5-507, MCA, is amended to read:

"**45-5-507. Incest.** (1) A person commits the offense of

incest if he knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact as defined in 45-2-101 with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. The relationships referred to herein include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter.

(2) Consent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.

(3) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed ~~10~~ 20 years or be fined an amount not to exceed $50,000, or both.

(4) If the victim is under 16 years of age and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing incest, he shall be imprisoned in the state prison for any term not to exceed ~~20~~ 40 years and may be fined not more than $50,000.

(5) In addition to any sentence imposed under subsection (3) or (4), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's

reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244."

Section 6. Section 45-5-511, MCA, is amended to read:

"45-5-511. Provisions generally applicable to sexual crimes. (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

~~(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart whether under a decree of judicial separation or otherwise. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.~~

~~(3) In a prosecution under the preceding sections on sexual crimes (45-5-502 through 45-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary~~

~~social-companion--of--the--defendant--and--the--intoxicating substance-was-voluntarily-and-knowingly-taken.~~

~~(4)~~(2) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except:

~~(a)--evidence--of--the-victim's-past-sexual-conduct-with the-offender;~~

~~(b)~~ evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.

~~(5)~~(3) If the defendant proposes for any purpose to offer evidence described in subsection ~~(4)(a) or (4)(b)~~(2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection ~~(4)~~(2).

~~(6)~~(4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

~~(7)~~(5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent."

Section 7. Section 45-2-101, MCA, is amended to read:

"45-2-101. General definitions. Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following

definitions apply in this title:

(1) "Acts" has its usual and ordinary meaning and includes any bodily movement, any form of communication, and where relevant, a failure or omission to take action.

(2) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

(3) "Another" means a person or persons, as defined in this code, other than the offender.

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in

the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses and includes all input, output, processing, storage, software, or communication facilities that are connected or related to such a device in a system or network.

(9) "Computer network" means the interconnection of communication systems between computers or computers and remote terminals.

(10) "Computer program" means an instruction or statement or a series of instructions or statements, in a form acceptable to a computer, that in actual or modified form permits the functioning of a computer or computer system and causes it to perform specified functions.

(11) "Computer services" include but are not limited to computer time, data processing, and storage functions.

(12) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(13) "Computer system" means a set of related, connected, or unconnected devices, computer software, or other related computer equipment.

(14) "Conduct" means an act or series of acts and the

accompanying mental state.

(15) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(16) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(17) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did

not intend to perform.

(18) "Defamatory matter" means anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or to injury to his or its business or occupation.

(19) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

~~(20) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.~~

~~(21)~~ (20) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

~~(22)~~ (21) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

~~(23)~~ (22) A "frisk" is a search by an external patting of a person's clothing.

~~(24)~~ (23) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

~~(25)~~ (24) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

~~(26)~~ (25) A "house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

~~(27)~~ (26) "Human being" means a person who has been born and is alive.

~~(28)~~ (27) An "illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

~~(29)~~ (28) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

~~(30)~~ (29) "Intoxicating substance" means any controlled substance as defined in Title 50, chapter 32, and any alcoholic beverage, including but not limited to any beverage containing 1/2 of 1% or more of alcohol by volume. The foregoing definition does not extend to dealcoholized wine or to any beverage or liquid produced by the process by

which beer, ale, port, or wine is produced if it contains less than 1/2 of 1% of alcohol by volume.

~~(31)~~(30) An "involuntary act" means any act which is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

~~(32)~~(31) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

~~(33)~~(32) "Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a

person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

~~(34)~~(33) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

~~(35)~~(34) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as a result of the influence of an intoxicating substance.

~~(36)~~(35) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

~~(37)~~(36) "Negligently"--a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that

is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

~~(38)~~(37) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

~~(39)~~(38) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, or transfer of title to, interest in, or possession of property.

~~(40)~~(39) "Occupied structure" means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

~~(41)~~(40) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

~~(42)~~(41) "Offense" means a crime for which a sentence of death or of imprisonment or a fine is authorized. Offenses are classified as felonies or misdemeanors.

~~(43)~~(42) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. Official detention does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

~~(44)~~(43) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

~~(45)~~(44) "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

~~(46)~~(45) "Owner" means a person other than the offender who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no

authority to exert control over the property.

~~(47)~~ (46) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

~~(48)~~ (47) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

~~(49)~~ (48) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

~~(50)~~ (49) "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

~~(51)~~ (50) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

~~(52)~~ (51) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

~~(53)~~ (52) "Premises" includes any type of structure or building and any real property.

~~(54)~~ (53) "Property" means any tangible or intangible

thing of value. Property includes but is not limited to:

(a) real estate;

(b) money;

(c) commercial instruments;

(d) admission or transportation tickets;

(e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner;

(f) things growing on, affixed to, or found on land and things which are part of or affixed to any building;

(g) electricity, gas, and water;

(h) birds, animals, and fish which ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof;

(j) any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement; and

(k) electronic impulses, electronically processed or

produced data or information, commercial instruments, computer software or computer programs, in either machine- or human-readable form, computer services, any other tangible or intangible item of value relating to a computer, computer system, or computer network, and any copies thereof.

~~(55)~~ (54) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender himself may have an interest in the property.

~~(56)~~ (55) "Public place" means any place to which the public or any substantial group thereof has access.

~~(57)~~ (56) "Public servant" means any officer or employee of government, including but not limited to legislators, judges, and firefighters, and any person participating as a juror, advisor, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term "public servant" includes one who has been elected or designated to become a public servant.

~~(58)~~ (57) "Purposely"--a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular

purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

~~(59)~~ (58) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

~~(60)~~ (59) "Sexual contact" means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

~~(61)~~ (60) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

~~(62)~~ (61) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

~~(63)~~(62) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

~~(64)~~(63) "Statute" means any act of the legislature of this state.

~~(65)~~(64) "Stolen property" means property over which control has been obtained by theft.

~~(66)~~(65) A "stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

~~(67)~~(66) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

~~(68)~~(67) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of a criminal offense;

(e) expose any person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of any person;

(g) reveal any information sought to be concealed by

the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause such action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

~~(69)~~(68) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be considered the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates,

releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be considered the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(iii) The value of electronic impulses, electronically produced data or information, computer software or programs, or any other tangible or intangible item relating to a computer, computer system, or computer network shall be considered to be the amount of economic loss that the owner of the item might reasonably suffer by virtue of the loss of the item. The determination of the amount of such economic loss includes but is not limited to consideration of the value of the owner's right to exclusive use or disposition of the item.

(b) When it cannot be determined if the value of the property is more or less than $300 by the standards set forth in subsection ~~(69)(a)~~ (68)(a), its value shall be considered to be an amount less than $300.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

~~(70)~~ (69) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision

for transport of an operator.

~~(71)~~ (70) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

~~(72)~~ (71) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding."

Section 8. *Section 27-2-216, MCA, is amended to read:*

"27-2-216. **Tort actions -- childhood sexual abuse.** (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:

(a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or

(b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

(2) It is not necessary for a plaintiff to establish which act, in a series of acts of childhood sexual abuse, caused the injury that is the subject of the suit. The plaintiff may compute the period referred to in subsection (1)(a) from the date of the last act by the same perpetrator.

(3) As used in this section, "childhood sexual abuse" means any act committed against a plaintiff who was less than 18 years of age at the time the act occurred and that would have been a violation of 45-5-502, 45-5-503, 45-5-504, ~~45-5-505~~, 45-5-507, 45-5-625, or prior similar laws in effect at the time the act occurred.

(4) The provisions of 27-2-401 apply to this section."

Section 9. Section 45-1-205, MCA, is amended to read:

"45-1-205. General time limitations. (1) (a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

(b) A prosecution under 45-5-502 through ~~45-5-505~~ 45-5-504, 45-5-507, or 45-5-625 may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years old at the time the offense occurred.

(2) Except as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony must be commenced within 5 years after it is committed.

(b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination thereof;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) The period prescribed in subsection (2) shall be extended in a prosecution for unlawful use of a computer, and prosecution shall be brought within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(5) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(6) A prosecution is commenced either when an

indictment is found or an information or complaint is filed."

Section 10. Section 45-2-103, MCA, is amended to read:

"45-2-103. General requirements of criminal act and mental state. (1) Except for deliberate homicide ~~as~~ defined in 45-5-102(1)(b) or an offense which involves absolute liability, a person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in subsections ~~(33)~~(32), ~~(37)~~(36), and ~~(58)~~(57) of 45-2-101.

(2) In deliberate homicide under 45-5-102(1)(b), the offender must act while having the mental state of purposely or knowingly only as to the underlying felony referred to in 45-5-102(1)(b).

(3) The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.

(4) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements thereof, the prescribed mental state applies to each such element.

(5) Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an

element of the offense unless the statute clearly defines it as such.

(6) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him;

(b) he acts in reliance upon a statute which later is determined to be invalid;

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret such statute.

(7) If a person's reasonable belief is a defense under subsection (6), nevertheless he may be convicted of an included offense of which he would be guilty if the law were as he believed it to be.

(8) Any defense based upon this section is an affirmative defense."

Section 11. Section 45-2-104, MCA, is amended to read:

"45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in subsections ~~(33)~~(32), ~~(37)~~(36), and ~~(58)~~(57) of 45-2-101 only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described."

Section 12. Section 46-15-401, MCA, is amended to read:

"46-15-401. When videotaped testimony admissible. For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507 and for the prosecution of any offense arising from the same transaction, as defined in 46-11-501, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence."

Section 13. Section 46-18-111, MCA, is amended to read:

"46-18-111. Presentence investigation. No defendant convicted of an offense under 45-5-502 through ~~45-5-505~~ 45-5-504, 45-5-507, or 45-5-625 against a victim who was less than 16 years old when the offense was committed may be sentenced or otherwise disposed of before a written report

of investigation by a probation officer is presented to and considered by the court. The investigation must include an evaluation of the defendant and a recommendation as to treatment by a person qualified by professional experience. No defendant convicted of any other offense that may result in commitment for 1 year or more in the state prison may be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court unless the court deems such report unnecessary. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense."

Section 14. Section 46-18-201, MCA, is amended to read:

"46-18-201. Sentences that may be imposed. (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

~~(a)~~ defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period, except as otherwise provided, not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) restitution;

(v) payment of the costs of confinement;

(vi) payment of a fine as provided in 46-18-231;

(vii) payment of costs as provided in 46-18-232 and 46-18-233;

(viii) payment of costs of court appointed counsel as provided in 46-8-113;

(ix) community service;

(x) any other reasonable conditions considered necessary for rehabilitation or for the protection of society; or

(xi) any combination of the above.

(b) suspend execution of sentence up to the maximum sentence allowed for each particular offense. The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Reasonable restrictions or conditions may include any of those listed in subsections (1)(a)(i) through (1)(a)(xi).

(c) impose a fine as provided by law for the offense;

(d) require payment of costs as provided in 46-18-232 or payment of costs of court-appointed counsel as provided in 46-8-113;

(e) commit the defendant to a correctional institution, with or without a fine as provided by law for the offense;

(f) impose any combination of subsections (1)(b) through (1)(e).

(2) If any financial obligation is imposed as a condition under subsection (1)(a), sentence may be deferred for a period not exceeding 2 years for any misdemeanor or for a period not exceeding 6 years for any felony, regardless of whether any other conditions are imposed.

(3) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, the court shall consider any elapsed time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit and state its reasons in the order. Credit, however, must be allowed for jail time already served.

(4) Except as provided in 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(3), and 45-9-103(2).

(5) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or

suspended.

(6) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of a defendant who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(7) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under 45-5-502(3), 45-5-503, 45-5-504, ~~45-5-505,~~ or 45-5-507 may not be deferred or suspended. Section 46-18-222 does not apply to the first 30 days of such imprisonment.

(8) In imposing a sentence on a defendant convicted of a sexual offense as defined in 46-23-502, the court may not waive the registration requirement provided in 46-18-254, 46-18-255, and Title 46, chapter 23, part 5.

(9) A person convicted of a sexual offense, as defined in 46-23-502, and sentenced to imprisonment in the state prison shall enroll in the educational phase of the prison's sexual offender program."

Section 15. Section 46-23-502, MCA, is amended to read:

"**46-23-502. Definitions.** As used in 46-18-254, 46-18-255, and this part, the following definitions apply:

(1) "Department" means the department of institutions

provided for in Title 2, chapter 15, part 23.

(2) "Sexual offender" means a person who has been convicted of a sexual offense.

(3) "Sexual offense" means:

(a) any violation of 45-5-502(3), 45-5-503, ~~45-5-505,~~ 45-5-507 (unless the act occurred between two consenting persons 16 years of age or older), or 45-5-625; or

(b) any violation of a law of another state or the federal government reasonably equivalent to a violation listed in subsection (3)(a)."

Section 16. Section 50-20-109, MCA, is amended to read:

"**50-20-109. Control of practice of abortion.** (1) No abortion may be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

(c) after viability of the fetus, unless in appropriate medical judgment the abortion is necessary to preserve the life or health of the mother.

(2) An abortion under subsection (1)(c) may only be performed if:

(a) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him setting forth in detail the facts upon which he relies in making such judgment; and

(b) two other licensed physicians have first examined the patient and concurred in writing with such judgment. The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(3) The timing and procedure used in performing an abortion under subsection (1)(c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 45-2-101~~(37)~~. The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.

(4) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(5) Violation of subsections (1), (2), and (3) of this section is a felony. Violation of subsection (4) of this section is a misdemeanor."

Section 17. Section 61-5-405, MCA, is amended to read:

"**61-5-405. Offenses furnishing ground for suspension or revocation of license.** (1) Items enumerated in Article IV(1), subsections (a), (b), (c), and (d) of 61-5-401 refer

specifically to 45-5-103, 45-5-104, 61-8-401, 45-2-101~~(21)~~(20), and 61-7-103, respectively.

~~(2)~~ In addition to convictions mentioned above the department, for the purpose of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported as it would if such conduct had occurred in this state for:

(a) convictions of perjury or the making of a false affidavit relating to the ownership or operation of a motor vehicle (61-5-303); and

(b) three convictions of reckless driving committed within a period of 12 months (61-8-301)."

NEW SECTION. **Section 18.** Repealer. Section 45-5-505, MCA, is repealed.

NEW SECTION. **Section 19.** Effective date. [This act] is effective on passage and approval.

-End-

HEARING ON HB 451
REVISE SEXUAL CRIMES

Presentation and Opening Statement by Sponsor:

REP. BROOKE, HD 56, stated this bill is an act to generally revise the laws relating to sexual crimes. In our statutes, we currently have victimless crimes defined as well as terms for which our codes define. This bill is an effort to discern where we need to delete and where we need to add definitions of a where we have a victim and no penalties set in place. Section one contains language that was adopted in HB 113. It defines the meaning of force. Sections 2, 3, and 4 deal with sexual assault, sexual intercourse without consent and indecent exposure. These section delete the spousal exemption for all these crimes. It is a strongly held belief that a person should be protected of a crime regardless of the relationship one has with the defendant. Section 5 brings penalties for the crime of incest into line with the penalties for all forms of sexual intercourse without consent. The punishment is consistent regardless of the relationship of the victim to the offender. The crime is punishable by imprisonment for any term not to exceed 20 years or a fine in the amount not to exceed $50,000 or both. Section 6 is the date rape section. Evidence of the victims past sexual conduct with the offender is deleted as a defense for the accused. Section 7 states all of the general definitions in 45-2-101 and all the definitions remain the same except on page 11 of the bill. The definition for deviate sexual relations is deleted and the bill continues with no changes.

Proponents' Testimony:

Holly Franz, President, Women's Law Section, gave written testimony in favor of HB 451. EXHIBIT 1

Bob Johnson, Montana Public Health Association, stated he is the Lewis and Clark County Health Officer and also represents himself. The aids issue has been a fantastic and tragic educational experience. About 5 years ago, my health department and staff decided we had to get serious about learning out aids and our mission to help the public contain the spreading of the disease in Montana. It has opened up a whole area that deals with social injustice and unnecessary discrimination.

A public health agency has the responsibility for containing the spread of the disease status. Aids has no cure and is also a disease that impacts all people of all persuasion of all races and all kinds of sexual activities. A significant portion of people who get aids are gay, male homosexuals. People who think they are at a high risk for having the HIV virus need to be tested in our health department. During that process we also spend alot of time and emphasis on counseling these people on how they can prevent them and their sexual partners form getting the

aids virus. In the cases where we identify someone with the aids virus, we then counsel that person on how they can take care of their health, what they should do from then on to keep as healthy as possible, but also counsel that person and ask them to tell us who their sex partners are and were. The process is then followed by a public health nurse to confidentially notify the sex partners of that individual that they should come in to be tested and receive counciling because they have come into contact with someone with the HIV virus. That is the most effective tool we have to contain the spread of this deadly disease. During the process of counselling and those people tell us who their sex partners are, and if there partners are of the same sex, they are admitting to being a felon in the state of Montana. That is a substantial barrier to the process of public health attempting to contain the spread of this disease. For this reason, I ask for your support of HB 451.

John Connor, Montana County Attorney's Association, stated our association generally supports this legislation and would be available for questions about the prosecutory aspects of the bill.

Bill Summers, President - Out in Montana, gave written testimony in favor of HB 451. **EXHIBIT 2**

Linda Gryczan, Montana Lesbian Coalition, gave written testimony in favor of HB 451. **EXHIBIT 3**

Steve Simpson, Out in Montana, gave written testimony in favor of HB 451. **EXHIBIT 4**

Scott Crichton, American Civil Liberties Union of Montana, stated they would like to go on record supporting this bill. We echo the sentiments and logic that has been presented so far.

Amy Pfeifer, Women's Law Section, State Bar of Montana, gave written testimony in favor of HB 451. **EXHIBIT 5**

Shawna Reinhardt, Missoula resident, gave written testimony in favor of HB 451. **EXHIBIT 6**

Aylee Hinderks, Date Rape Survivor, Great Falls, gave written testimony in favor of HB 451. **EXHIBIT 7**

Star Jameson, Director - Rape Center of Northwestern Montana, gave written testimony in favor of HB 451. **EXHIBIT 8**

Diane Sands, Montana Women's Lobby, stated they are in support of this bill. I would like to submit testimony for people that could not be here. One is for Janet Allison, Ph. D. Psychologist in the state of Montana who is in support of this bill. Another is Ellen Leahy, a Health Officer in the state of Montana who is in support of this bill. **EXHIBIT 9 & 10**

Opponents' Testimony:

Jay Printz, Ravalli County Sheriff, stated he has mixed emotions on this bill. I have a concern over the portion of the bill that deals with deviate sexual relations that will be stricken. The other proponents talk about consenting adults but no testimony in regards to animals. I have personally investigated several cases where animals have been victimized. The people involved in these types of activities are very sick. If you look at deleting deviate sexual relations, you need to consider leaving in the part about the sexual relations to animals.

Informational Testimony:

Dan Russell, Administrator - Divisions of Corrections, stated it is important to know that there will be a prison impact from this bill. This bill has only two parts that concern us and those relate to the sentencing portion of the bill. There are several portions of the bill that expand the possibility to prosecute for certain sex offenses and the other is the sentence enhancement areas where it double the sentence for incest.

We contacted the attorney general's office and they anticipate an additional 4 or 5 convictions each year and of those, at least 2 or 3 would result in prison sentences. This 2 or 3 additional prison placements combined with all those bills you will hear, will create some serious problems with the prison overcrowding.

Questions From Committee Members:

REP. LEE asked **Holly Franz** if she would be comfortable in leaving that last part of deviate sexual relations with an animal. **Ms. Franz** stated it would be correct to say the bestiality portions of the deviate sex has not been the focus of our efforts. I am unaware of whether or not there are other laws that would make such a mistreatment of an animal a criminal act. We have no real strong stand on that particular part of the bill.

REP. JOHNSON asked **Ms. Franz** why section 16 is added into the bill? **Ms. Franz** stated because we eliminated the definition of deviate sexual conduct, that is included in a long list of definitions for criminal statues, when we came to deviate sex it was a "d" word so all of the e through z words got pushed up one number. Because we are numbering all the subsections, the legislative council told us we have to go through and change all of those statutes. You will note when looking at all those various subsections, they have gotten rid of the sub-section so it refers to the definition statutes. In the future when definitions are reordered you will not have to go through and change every single statute from the first of the definitions.

REP. DARKO asked **John Conner** if he had any idea how many prosecutions are made under section 45-5-505? **Mr. Conner** stated

doesn't know how many prosecutions have been filed under this section. I know that what Holly Franz said is true that a person my look at this section as a problem with the constitution. It does amount to deny equal protection.

REP. MEASURE asked **John Conner** why is there a need to decriminalize sex acts between consenting adults in a homosexual or lesbian relationship and increasing penalty for sex acts between adults? **Mr. Conner** stated he was not involved in the drafting but in the prosecution stand point charges of incest most often arise where there has been a step-father having had some sort of sex offense against his step-daughter. In those instances, they are often charged under the sexual contact language because of the fact it is difficult to prove penetration when they only have the testimony of the child. **Holly Franz** stated the purpose of our amendment to the incest statute was to allow flexibility, particularly in keeping with rape situations, so the subject of celestial sex is not particularly foremost in our minds. I am not ready to say that I would support decriminalizing incest.

Closing by Sponsor:

REP. BROOKE thanked everyone for their testimony in a sometimes sensitive area. I encourage you support of this bill.

HEARING ON HB 631
SENTENCE RESTRICTIONS FOR SEXUAL OFFENSES

Presentation and Opening Statement by Sponsor:

REP. MCCULLOCH, SD 96, stated this is a bill that provides mandatory sentence of two years in prison for those offenders convicted of sexual assault against younger children. In my mind there is nothing worse than when this is done to innocent, defenseless children. I have brought this bill to you today because the present system of deterrents is moderate and as a response to the increase of sexual assault done to our children by adults. Adult offenders usually get the equivalent to no more than a slap on the hands. It is obvious that this crime is considered serious as current law is a maximum of 20 years and a fine of $50,000. Yet, the sentencing is always suspended and the offenders are required in a treatment that last no more than 30 days. After the 30 day program is completed, usually these defenders are deemed cured and released back onto the streets where almost 40% become repeat offenders. Thirty days is not considered a very long time when the victims live with this for the rest of their lives.

Proponents' Testimony: none

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL DATE 2-13-91

NAME	PRESENT	ABSENT	EXCUSED
REP. VIVIAN BROOKE, VICE-CHAIR	✓		
REP. ARLENE BECKER	✓		
REP. WILLIAM BOHARSKI			✓
REP. DAVE BROWN	✓		
REP. ROBERT CLARK	✓		
REP. PAULA DARKO	✓		
REP. BUDD GOULD	✓		
REP. ROYAL JOHNSON	✓		
REP. VERNON KELLER	✓		
REP. THOMAS LEE	✓		
REP. BRUCE MEASURE	✓		
REP. CHARLOTTE MESSMORE	✓		
REP. LINDA NELSON	✓		
REP. JIM RICE	✓		
REP. ANGELA RUSSELL	✓		
REP. JESSICA STICKNEY	✓		
REP. HOWARD TOOLE	✓		
REP. TIM WHALEN	✓		
REP. DIANA WYATT	✓		
REP. BILL STRIZICH, CHAIRMAN	✓		

EXHIBIT 1
DATE 2-13-91
HB HB451

HOUSE BILL 451

TESTIMONY OF THE WOMEN'S LAW SECTION OF THE STATE BAR

My name is Holly Franz. I am the President of the Women's Law Section of the State Bar. The Women's Law Section is an organization of more than 100 attorneys who are concerned about the effect of Montana's laws on women. The Women's Law Section strongly urges support of HB 451.

HB 451 is a general revision of the sexual crimes act. It is designed to conform penalities for all rapes, to eliminate spousal exceptions, to redefine force to include the threat of retaliatory action, to repeal the crime of sexual deviate conduct, and to recognize the crime of date rape. My testimony will concentrate on the repeal of the deviate sex act. Amy Pfeifer of the Women's Law Section will address the date rape provisions.

Several of the provisions in HB 451 have already been addressed by other legislation. Representative Tom Lee's HB 113 redefines force to include the threat of retaliatory action. HB 113 was passed by both the House and Senate and referred to a conference committe. Section 1 of HB 451 also redefines force.

Representative Dorothy Bradley's HB 211 conforms the penalties for heterosexual and homosexual rape. HB 211 was passed by the House and referred to the Senate Judiciary Committee. Section 3 of HB 451 also conforms these penalties.

Conform penalties: Representative Dorothy Bradley's HB 211 has already conformed the penalties for heterosexual and homosexual rape. The maximum prison term for heterosexual and homosexual rape is 10 years. If the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury, then the maximum prison term is 20 years.

The maximum prison penalty for incest is 10 years or 20 years if the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury. The crime of incest includes sexual intercourse with a family member. As the law now

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stands, the maximum penalty for incestual rape is one-half of the penalty for non-incestual rape. Section 5 of HB 451 conforms these maximum penalties.

The maximum rape penalty should not differ depending upon the identity of the victim. HB 451 does not suggest that the maximum prison sentence should be imposed against all rapists or against all persons guilty of incest. The crime of incest includes, in addition to rape, the act of knowingly marrying, cohabiting with, or having sexual contact with an ancestor or descendant. In many situations the maximum penalty would not be appropriate. In those situations, however, where it is appropriate, a sentencing judge should have the discretion to sentence the offender to the maximum prison penalty regardless of the identity of the victim.

Spousal exceptions: Montana law originally did not define spousal rape or sexual assault as a crime. The 1985 legislature, in recognition of the serious problem of domestic abuse, removed the spousal exception from the rape law. Sections 2 and 4 remove the spousal exceptions from the crimes of sexual assault and indecent exposure. There are many situations when the crime of sexual assault or indecent exposure, which requires the causing of affront or alarm, could be an element of domestic abuse. In those situations, the conduct should be defined as criminal.

Threat of retaliatory action: Section 1 of HB 451 redefines force to include the threat of retaliatory action. Representative Tom Lee's HB 113 has already redefined force.

Date rape: Section 6 of HB 451 addresses the problem of date rape. Under current Montana law, if a person is raped while mentally incompetent to consent to sex, the offender is not guilty if the victim was a voluntary social companion of the offender and the alcohol was voluntarily consumed. A person is mentally incapacitated if she is temporarily incapable of appreciating or controlling her conduct due to alcohol. If an offender rapes someone in this condition, it should not matter who the victim was drinking with.

Section 6 of HB 451 also amends the rape shield law. In most situations, a victim's past sexual history is inadmissible in rape trials. Montana law does, however, allow evidence of the victim's past sexual conduct with

the offender. HB 451 would disallow such evidence. The fact that a person has consented to sex in the past is not consent to unlimited sex. Each sexual encounter should be judged on its own merit. If the statutory elements of rape, including the threat of violence or retaliatory action, are present, then a rape has occurred regardless of the victim and offender's past sexual relations.

Deviate Sex: Section 18 of HB 451 repeals the crime of deviate sexual conduct. Because Representative Dorothy Bradley's HB 211 has already incorporated nonconsensual deviate sex into the rape statute, HB 451 need only address consensual deviate sex. Deviate sex is defined to include all sexual contact or sexual relations between members of the same sex. It applies to the private sexual conduct of consenting adults.

At least 25 states, including Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinios, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming, have decriminalized consensual homosexual activity. The Model Penal Code, adopted by the American Law Institute, and the American Bar Association recommend the decriminalization of consensual homosexual conduct. The Model Penal Code was the catalyst for change in many states. While most of the states acted legislatively, a number of state courts have ruled such statutes unconstitutional as a violation of the right to privacy and equal protection.

The U.S. Supreme Court ruled in 1986 that deviate sex statutes do not violate the federal right of privacy. The statute may, however, violate Montana's constitution. Montana's constitution, unlike its federal counterpart, expressly provides a right to privacy. The right to privacy typically protects private sexual acts between consenting adults. It is very likely that Montana's deviate sex act is unconstitutional under Montana's Constitution.

Montana's deviate sex act may also be unconstitutional because it criminalizes behavior based on an immutable trait. Scientific research indicates a person has little control over his or her sexual orientation and that once acquired, sexual orientation is largely impervious to change. In 1973, The American

Psychiatric Association removed homosexuality from its list of psychic disorders. The American Medical Association followed suit in 1975 by endorsing the decriminalization of homosexual conduct between consenting adults.

Due to unresolved constitutional questions, many county attorneys will not file charges under the deviate sex act. Nonetheless, the fear of felony charges has hindered county health efforts. HIV positive male homosexuals are hesitant to disclose their sexual partners because it implicates them and their partners in the commission of a felony. The deviate sex act, rather than deterring homosexuality, deters AIDS prevention and treatment.

The deviate sex act should be repealed. It is arguably unconstitutional. It criminalizes an entire class of people based on unchangeable traits. It is not enforced, and it impairs public health concerns. It is a bad law that should be repealed.

The Women's Law Section urges support of HB 451. (The opinions of the Women's Law Section are its own and do not necessarily reflect the opinion of the State Bar of Montana.)

2
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451

O U T I N M O N T A N A, I N C.

TESTIMONY IN FAVOR OF

H.B. 451

(BEFORE THE HOUSE JUDICIARY COMMITTEE, FEBRUARY 13, 1991)

MY NAME IS BILL SUMMERS. I AM PRESIDENT OF OUT IN MONTANA (OIM), THE STATEWIDE GAY AND LESBIAN ADVOCACY AND SUPPORT ORGANIZATION. THE LESBIANS AND GAY MEN OF MONTANA HAVE BEEN, SINCE THE ONSET OF THE AIDS EPIDEMIC, IN THE FOREFRONT OF THE BATTLE AGAINST THE SPREAD OF THE DEADLY HUMAN IMMUNODEFICIENCY VIRUS (HIV). GAYS HAVE BEEN INSTRUMENTAL IN THE FORMATION OF THE VARIOUS LOCAL COMMUNITY BASED ORGANIZATIONS THAT HAVE BEEN ESTABLISHED TO PROVIDE SUPPORT FOR THOSE INFECTED WITH HIV: THE YELLOWSTONE AIDS PROJECT, THE LEWIS AND CLARK COUNTY AIDS PROJECT, THE MISSOULA AIDS COALITION, THE BUTTE AIDS SUPPORT SYSTEM, AND OTHERS. OUR ORGANIZATION HAS FOR THE PAST TWO YEARS SENT A FULL-TIME HEALTH INSTRUCTOR AROUND THE STATE TO EXPLAIN TO THOSE AT GREATEST RISK FOR INFECTION, THE PROPER METHODS TO PREVENT OR LESSEN THE CHANCES OF INFECTION BY HIV AND SEXUALLY TRANSMITTED DISEASES. UNDER A GRANT FROM THE FEDERAL CENTERS FOR DISEASE CONTROL ADMINISTERED BY THE MONTANA DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, STEVE SIMPSON, OUR HEALTHY LIFESTYLES INSTRUCTOR, HAS DISTRIBUTED WELL OVER 5,000 FREE CONDOMS, HAS CONDUCTED WORKSHOPS FOR OVER 100 GAY AND BISEXUAL MEN, AND HAS COUNSELLED YET ANOTHER 100 GAY AND BISEXUAL MEN OVER THE TELEPHONE.

WE CONSIDER EACH EDUCATIONAL CONTACT A SUCCESS. HOWEVER, I AM HERE IN SUPPORT OF H.B. 451 FOR A MOST SIGNIFICANT REASON. IN MONTANA, SEXUAL CONTACT BETWEEN TWO PEOPLE OF THE SAME GENDER IS A FELONY PUNISHABLE BY FINES AND A PRISON SENTENCE. IT IS UNDER A BLANKET OF FEAR IMPOSED BY THE DEVIATE SEXUAL BEHAVIOR STATUTE THAT WE MUST PROVIDE HEALTH INFORMATION. IN LARGE MEASURE BECAUSE OF THE FEAR INSTILLED BY THIS STATUTE, WE ARE UNABLE TO ESTABLISH CONTACT WITH THE VERY POPULATION WE WISH TO ASSIST. THE IRONY IS, OF COURSE, THAT THE SEXUAL ACTIVITY CONTINUES IN THE FACT OF THE STATUTE. THE CURRENT LAW DOES NOT PREVENT THE ACTIVITY, BUT IT DOES MAKE ESSENTIAL EDUCATION NEARLY IMPOSSIBLE.

LET ME SHARE A STORY WITH YOU TO ILLUSTRATE MY POINT. THREE YEARS AGO, OUT IN MONTANA SOUGHT TO CONDUCT A SAFER-SEX WORKSHOP FOR HELENA'S GAY MALE POPULATION. WE COULDN'T GET ANY ONE TO COME, SO WE PROMISED (1) THAT ONLY GAY MEN COULD ATTEND, (2) THAT THERE WOULD BE NO ONE PRESENT CONNECTED WITH STATE OR LOCAL GOVERNMENT,

(4) THAT THE INSTRUCTORS WOULD BE BROUGHT FROM OUT OF TOWN, (5) THAT NO NAMES WOULD BE USED IN THE COURSE OF THE EVENING, (6) AND THAT THE WORKSHOP ITSELF WOULD BE HELD IN A PRIVATE HOME RATHER THAN A PUBLIC AREA. WITH ALL THESE PRECAUTIONS WE WERE ABLE TO GET ONLY 25 MEN. ACCORDING TO THE KINSEY STATISTICS, AT A MINIMUM THERE ARE PROBABLY CLOSE TO 1,000 HOMOSEXUAL MEN IN THE CITY OF HELENA ALONE! SUCH IS THE EFFECT OF FEAR.

I WISH I COULD PROMISE YOU THAT PASSAGE OF H.B. 451 WOULD CHANGE ALL OF THIS. I CAN'T DO THAT, BECAUSE IT WON'T. WHAT IT WILL DO, HOWEVER, IS BEGIN TO MAKE OUR JOB EASIER. BY DE-CRIMINALIZING SAME-GENDER ADULT SEXUAL CONDUCT, YOU WILL REMOVE A MAJOR BARRIER IN THE WAR AGAINST HIV INFECTION.

WE URGE YOU TO APPROVE H.B. 451 AS WRITTEN. THANK YOU.

to attend

consensual

EXHIBIT 2
DATE 2-13-91
HB 451

Linda Gryczan
PO Box 124
Clancy, MT 59634

Mr. Chairman and members of the committee, I am Linda Gryczan speaking for the Montana Lesbian Coalition in support of House Bill 451.

Lesbians and gay men are your constituents. Though you may not identify us as such, you see us every day. We live throughout Montana. We are in the cities, we come from the smallest towns and we live on the reservations.

Most of us go to our jobs, we run our businesses, and raise our children. Our lives are different only in the rather unremarkable fact of who we love. But because of this difference, a group of otherwise law abiding citizens are felons under Montana law.

I am not asking for your approval or endorsement of my life. I am not asking for any special privileges under the law. I am simply appealing to your sense of fairness and equality. I am asking you to vote for the passage of House Bill 451.

EXHIBIT 4
DATE 2-13-91
HB 451

Mr Chairman,

Representitives,

For the record, my name is Steve Simpson and I work for Out In Montana, the statewide gay and lesbian organization. My concern is the spread of HIV infection in Montana.

I want to go on record as supporting House Bill 451 because I believe the people of Montana have the right to know how to protect themselves from this incurable illness and educators need to have legislation that will maximize their efforts to provide this information.

Having worked with hundreds of gay men and women over the last several years I know the current law prevents many people from not only seeking information about AIDS, but also seeking medical attention that could save their lives.

Every major AIDS organization in the world has stressed education as the number one way to slow the spread of AIDS, yet under the current law effective educational efforts could be construed as promoting illegal behavior. House Bill 451 would not only bring Montana law up to date with Federal standards, but would also protect our constitutional rights.

I see no disadvantages to this change in legislation, but I see literally hundreds of lives being spared the tragedy of AIDS. I would like to state once again my support of House Bill 451.

Thank you for your time.

EXHIBIT 5
DATE 2-13-91
HB 451

Amy Phillips

February 13, 1991

To: House Judiciary Committee

From: Women's Law Section, State Bar of Montana

Subject: HB 451, An Act to Generally Revise the Laws Relating to Sexual Crimes

At the outset I must state that the following is the position of the Women's Law Section of the State Bar of Montana, and not necessarily that of the State Bar of Montana.

The Women's Law Section of the State Bar of Montana wholeheartedly supports HB 451. Prior to the beginning of the session, the provisions of this bill were determined by the Women's Law Section to be one of our priorities for this session.

As Holly Franz has addressed the other provisions of the bill, I am only here to testify regarding the proposed amendments to subsections (3) and (4) of MCA 45-5-511.

After reviewing the criminal law of many states relating to the issues of consent and admissibility of evidence in the prosecution of sexual intercourse without consent and sexual assault cases, the Women's Law Section believes the changes proposed to these subsections are entirely appropriate and necessary.

Of the fifteen states and the 1962 Model Penal Code examined, not one provided a voluntary social companion defense. Not one provided, as we do, that a victim, by accepting a date with the defendant, and voluntarily drinking alcohol with him, is not entitled to the protection of the criminal law when she is raped or sexually assaulted. A woman, or man, who accepts a date, or perhaps is introduced to someone at a party is not consenting to sexual intercourse or sexual contact any more than is a person who is attacked in her home by a stranger. These victims, voluntary social companions, are entitled to protection of our criminal laws; they are entitled to the removal of this provision as a defense to these crimes. Those that commit the crimes of sexual intercourse without consent, sexual assault and indecent exposure should be held accountable for their acts.

In the same way, a victim who has once consented to sexual intercourse or sexual contact with the defendant in the past has not forever waived her right to withhold consent in the future. A lack of consent for any particular act is rape, or sexual assault. It is for this reason that we propose the deletion of current subsection (4) of MCA 45-5-411. Each act/occurrence should be evaluated on whether consent was given at that time.

On behalf of the victims of these offenses, we ask for your support and urge passage of HB 451.

EXHIBIT 6
DATE 2-13-91
HB 451

Shawna Reinhardt
108 Turner Hall
Missoula, MT 59801

I was asleep in my room late one night when I awoke to an unfamilar body on top of me. My night shirt had been discarded and I felt his filthy hands groping my body. I knew I was in trouble, but my body refused to move; I was at the mercy of the man who had entered my room. When he finally left, I was stunned.

My name is Shawna Reinhardt, and I am a junior at the University of Montana. In May of 1990, I was violated sexually while living on campus in Knowles Hall. I was one of 13 women who had been assaulted or raped by the same man who was attending the University of Montana.

It was a cruel violation of my being that has affected me terribly. I was intimidated and degraded. I withdrew from everyone I had ever cared about. A women is raped every nine minutes in this country, which means there are thousands upon thousands of women who feel similarly.

Because of overwelming fear and shame, I told noone. Eventually the truth became evident and I became actively involved in the prevention of rape. I participated in the Ad-Hoc Rape Task Force at UM and witnessed some wonderful changes and steps towards more changes. I was asked to sit on a Presidentially appointed task force in December of 1990. We are attempting to review policy and make recommendations.

I therefore support House Bill 451. Many different organizations are addressing the growing problem of rape and sexual assault. These crimes are extremely damaging to the victim, both physically, socially and psychologically. We, as a society, have laws dealing with political terrorism. Now we must have laws dealing with a more insidious form of terrorism, rape. All women have the fear and therefore the terror of being raped. It is unfortunate that we must enact legislation to combat the serios crimes we are facing, but we must!

Help survivors and future victims by voting for House Bill 451.

EXHIBIT 7
DATE 2-13-91
HB 451

Aylee Hinderks
1616 5th St. NW
Great Falls, MT
Feb. 12,1991

My name is Aylee Hinderks and I am a date rape survivor. I hope that by now we all understand that rape is a devastating crime, one from which it takes an infinite amount of time from which to heal. I also hope we all understand how traumatic the rape victim's experience with police and courts can be. What we may not understand is that for the victim of date rape this experience is often much worse.

Date rape is not taken seriously by many police and prosecuters. Nearly two years ago I was raped by a boy I was dating. We reported the rape to to the police and provided them with a list of witnesses who could testify that I had been suffering from rape trauma syndrome. The police took my statement. Several weeks later they requested I take a polygraph test, which I did. Then, without interviewing any of the witnesses or talking with my attacker, they closed their "investigation" and forwarded my case to the county attorney.

Repeated calls to youth court and the prosecuter's office brought only pleas for patience. They were busy, but would get to my case as soon as possible. They requested no additional investigation. Five months after the county attorney's office received my file they called me for the first time: they were dropping my case. It would be too expensive to prosecute and no one would believe me anyway.

We were so angry that a meeting was arranged to discuss what had gone wrong. The chief of police, county attorney and head of youth court services attended. They determined that the investigation needed to be completed before any decision could be made regarding prosecution.

Ex. 7

All the witnesses were finally interviewed and the person who raped me was finally brought in for questioning, thirteen months after the rape was reported. The file was then sent back to the county attorney's office. That was in August of 1990. I have yet to hear one word from them. Our letters have gone unanswered.

After nearly two years of this nonsense I have had nothing but false hopes. Rape and the legal system have changed my life forever. My family and the people I care about have been affected byt the rapist has not.

For myself, the lealing process is a daily battle that has been unnecessaily prolonged because even the satisfaction of justice has never been granted to me.

Today I wish to make it clear to you that when a person has been the victim of date rape they need the support and protection of the legal system, not its indifference. I believe the passage of this bill will help to impress upon law enforcement the seriousness of all crimes of sexual abuse, and for this reason I appeal to you to vote in favor of its passage.

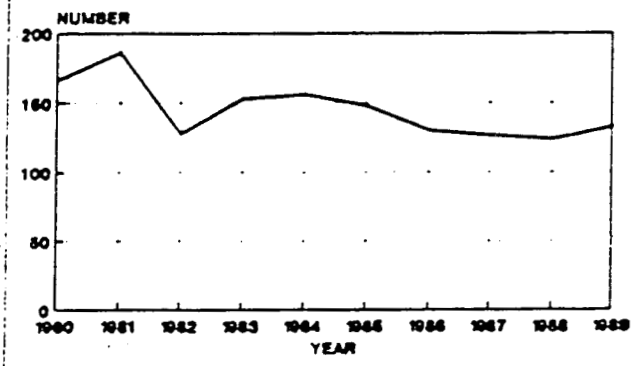
Thank you.

Sid Gamson

EXHIBIT 8
DATE 2-13-91
HB 451

SEX CRIMES ACT - FACT SHEET

REPORTED FORCIBLE RAPES IN MONTANA 1980-1989



1988-1989 COMPARISON

	1988	1989	% Diff.
No. Offenses	124	133	+7.0%
State Rate	15.4	16.5	+7.1%
National Rate	37.6		

From Crime in Montana, 1989 Annual Report, Montana Board of Crime Control.

WHAT IS RAPE?

* A crime of violence in which the goal is to overpower, intimidate, and degrade the victim.

* The law is the same whether the assailant is a stranger or someone known to the victim.

* Rape is usually planned in advance: 71% of all single assailant assaults, and 90% of all gang rapes are planned. Rape does not occur because of a temporary loss of control.

*Rape is most often committed by heterosexual men (98% of reported rapes).

*In 80% of reported rapes the rapist is known to the victim.

The boxed statistics concern rape: the carnal knowledge of a female forcibly and against her will. Both assaults and attempts to commit rape by force are included in this definition.

Statutory rape (without force) and sexual assaults against males are classified as sexual offenses, and are not counted under the rape classification. There were 1,499 sexual offenses reported or known to the police, 316 cleared by arrest, in Montana in 1989.

According to the FBI, 1 in 3 women and 1 in 10 men will be raped sometime in their life; only 10% of rapes ever get reported to the police. This makes rape the most under-reported crime in the country.

According to the U.S. Senate Judiciary Report: rape has increased four times as fast as the overall crime rate over the last decade. U. S. rape rate is four times that of Germany, 18 times that of England and 20 times that of Japan.

A WOMAN IS RAPED EVERY 2 DAYS 22 HOURS IN THE STATE OF MONTANA.

Women's Place Rape Crisis Center in Missoula assisted over 150 rape victims in the past two years. The trauma of rape lasts a lifetime. This information prepared by Women's Place, 521 North Orange Street, Missoula, Montana.

EXHIBIT 9
DATE 2-13-91
HB 451

Bitterroot Psychological Services

February 12, 1991

To the Montana House Judiciary Committee:

I am Janet R. Allison, Ph.D., a licensed psychologist in the state of Montana. I am writing in support of H.B. 451, and specifically the elimination of the term "deviate sexual conduct" to describe sexual contact between two persons of the same sex.

For a number of years, the professions of psychology and psychiatry have recognized that homosexuality is not a mental disorder or defect, and removed homosexuality from the official Diagnostic and Statistical Manual. Instead, homosexual preference is seen as either a choice, or an inborn trait (much like left-handedness).

Increasingly, with the development of awareness of the social context on individual psychology, my profession has come to see many of the common problems of homosexual individuals as resulting from the stigma that society places on homosexuality. I hope that the legislature will remove this legal basis for stigmatizing a perfectly normal group of human beings.

Sincerely,

Janet R. Allison, Ph.D.

Janet R. Allison, Ph.D.
Licensed Clinical Psychologist

M. Joan Hese-Homeier, Ph.D.
Licensed Clinical Psychologist

Paul W. Moomaw, Ph.D.
Licensed Clinical Psychologist

128 South 6th West
Missoula, Montana
59801
(406) 543-8415

MISSOULA COUNTY
MISSOULA

CITY-COUNTY HEALTH DEPARTMENT
301 W. ALDER
MISSOULA, MONTANA 59802

(406) 721-5700

EXHIBIT 10
DATE 2-13-91
HB 451

February 11, 1991

Honorable Representative Bill Strizich, Chairman
Judiciary Committee
Montana House of Representatives
Capitol
Helena, MT 59620

Dear Representative Strizich:

I am writing in SUPPORT of HB 451 which proposes to generally revise sexual crimes including repealing the crime of sexual deviant conduct.

As a local health officer, I am charged with the control of communicable disease. Meeting this responsibility is particularly difficult in the case of AIDS which affects primarily male homosexuals - a population whose sexual activities are illegal in Montana. The current sexual deviance code criminalizing sexual contact between same sex, consenting adults creates, for those most at risk for AIDS, a dangerous disincentive to coming forward for testing and reporting sexual contacts.

Because of the lengthy, asymptomatic, yet contagious incubation period of AIDS, the epidemic is inherently rather hidden and unreachable. Montana law adds another, unnecessary barrier to controlling this epidemic.

I urge your support of HB 451.

Sincerely,

E. Leahy

Ellen Leahy
Health Officer

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

House Judiciary COMMITTEE BILL NO. HB# 451

DATE 2-13-91 SPONSOR(S) Rep. Brooke

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Tootie Welker	MAPP	X	
DAN BENNETT Gt. FALLS	—	X	
Aylee Hinderks	—	X	
Steve Simpson	Out In Montana, Inc	X	
WM. C. SUMMERS	OUT IN MONTANA	X	
Amy Pfeifer	Women's Law Section	X	
Diane SANDS	MT Women's Lobby	X	
Mary Beth Frideres	Lewis & Clark City/Co. Health Dept	X	
JAY PRITZ	SHERIFF RAVALLI County		X
Constance Enzweiler	Self	X	
Holly Franz	Women's Law Section	X	
Anette Arendt	Self	X	
Lynda Gregson	NLC	X	
Robert K Johnson	MPHA	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

Sandra Lee Hale Box 252, Clancy 59634 X

Scott Crichton ACLU / MT X

1 of 1

Motion: REP. MEASURE MADE A SUBSTITUTE MOTION to amend as proposed amendments, but on line 4 and 5 of new section 4, it would say "secured by this act" and strike "constitution and laws in the state of Montana".

Vote: Motion carried 12 to 8. EXHIBIT 1

Motion: REP. MEASURE MOVED HB 417 DO PASS AS AMENDED.

Discussion: REP. RICE stated he felt the committee has amended a lot into this bill and is nervous about continuing on until he has had an opportunity to go through it and study it a little bit.

Motion: REP. CLARK MOVED HB 417 BE TABLED. Motion carried 17 to 3 with Rep's: Toole, Brown and Strizich voting no.

EXECUTIVE ACTION ON HB 451

Motion: REP. BROOKE MOVED HB 451 DO PASS.

Motion: REP. BROOKE moved to amend HB 451. EXHIBIT 2

Discussion: John MacMaster directed the committee to look at page 7 of the bill. We are in a section of the bill that says that when criminality depends on the victim being less than 16, that the defense for the defendant prove that he reasonably believes the child to be above that age. On page 5, lines 5 and 6, they are taking out the "Date-Rape Provision" which says evidence of the victims past sexual with the offender is admissible. On lines 10-14 there is a procedure that the court goes through if the defendant is going to propose and evidence about the victims past conduct. What these amendments do is put back in what is struck on lines 5 and 6 of page 7. Therefore, that evidence would then be admissible. The rest of the amendments would strike what is on lines 10-14 which is the procedure the court goes through when you offer this kind of evidence.

REP. RUSSELL asked REP. BROOKE what reason there might be for these amendments? REP. BROOKE stated during the hearing, Holly Franz, who drafted the bill, had heard from Rep. Measure that he had some concerns about what was being deleted from the law about defense. Ms. Franz handed me a suggestion and I haven't had a lot of time to put into them, they're offered because of the concern I heard from other members. REP. BROOKE stated she was not sure she was in favor of them, but wanted to put them out for discussion.

REP. TOOLE stated this bill was going to eliminate Date-Rape Provisions and this amendment restores that.

REP. BROOKE WITHDREW HER MOTION TO AMEND HB 451.

REP. WHALEN asked **REP. BROOKE** whether she was trying to get to a situation where people were unwilling to come forward because to find out if they possibly had the HIV infection but couldn't admit to deviate sexual conduct and be prosecuted? **REP. BROOKE** said that was one of her objectives.

Motion: **REP. WHALEN** moved to amend HB 451 by striking all the amendments to the statutes or new sections that have been inserted with the exception of page 11, lines 15-17 modifying it to read "deviate sexual relations means any form of sexual conduct or intercourse with an animal".

Vote: Motion failed.

Motion: **REP. BROOKE** moved to amend HB 451 by saying bestiality means any form of sexual contact with animal and renumber subsections. Motion carried.

Motion: **REP. BROOKE MOVED HB 451 DO PASS AS AMENDED.**

Motion/Vote: **REP. WHALEN MADE SUBSTITUTE MOTION THAT HB 451 BE TABLED.** Motion failed.

Motion/Vote: **REP. NELSON** moved to amend HB 451 on page 3, line 10, after the word "another" insert the word "person". Motion carried.

Motion/Vote: **REP. MEASURE** moved to amend HB 451 on line 19, page 5, strike 20 and reinsert 10. Motion failed. **EXHIBIT 3**

Motion/Vote: **REP. MEASURE** moved to amend HB 451 on line 19, page 5, reduce 40 to 20. Motion carried 19 to 1 with Rep. Brooke voting no.

Motion/Vote: **REP. MEASURE** moved to amend HB 451 by reinstating lines 11 - 20 on page 6. Motion failed. **EXHIBIT 4**

Motion/Vote: **REP. MEASURE** moved to amend HB 451 by inserting "evidence of the victim's past sexual conduct with the offender or" on page 7, line 7. Motion carried 10 to 9. **EXHIBIT 5**

Motion/Vote: **REP. BROOKE** moved to amend HB 451 to coordinate it with SB 51. Motion carried unanimously.

Motion/Vote: **REP. BROOKE MOVED HB 451 DO PASS AS AMENDED.** Motion carried 13 to 7. **EXHIBIT 6**

EXECUTIVE ACTION ON HB 417

Motion: **REP. MEASURE MOVED HB 417 BE RECONSIDERED.** Motion carried.

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL **DATE** 2-16-91

NAME	PRESENT	ABSENT	EXCUSED
REP. VIVIAN BROOKE, VICE-CHAIR	/		
REP. ARLENE BECKER	/		
REP. WILLIAM BOHARSKI	/		
REP. DAVE BROWN	/		
REP. ROBERT CLARK	/		
REP. PAULA DARKO	/		
REP. BUDD GOULD	/		
REP. ROYAL JOHNSON	/		
REP. VERNON KELLER	/		
REP. THOMAS LEE	/		
REP. BRUCE MEASURE	/		
REP. CHARLOTTE MESSMORE	/		
REP. LINDA NELSON	/		
REP. JIM RICE	/		
REP. ANGELA RUSSELL	/		
REP. JESSICA STICKNEY	/		
REP. HOWARD TOOLE	/		
REP. TIM WHALEN	/		
REP. DIANA WYATT	/		
REP. BILL STRIZICH, CHAIRMAN	/		

2.25
2-18-91
JDB

HOUSE STANDING COMMITTEE REPORT

February 18, 1991

Mr. Speaker: We, the committee on Judiciary report that House Bill 451 (first reading copy -- white) do pass as amended .

Signed: _____
Bill Strizich, Chairman

And, that such amendments read:

1. Title, line 7.
Strike: "REPEALING"
Insert: "AMENDING"

2. Title, line 9.
Strike: "45-1-205,"

3. Title, line 10.
Following: "45-5-504,"
Insert: "45-5-505,"

4. Title, lines 10 and 11.
Strike: "46-15-401" on line 10 through "46-23-502," on line 11

5. Title, line 12.
Strike: "REPEALING SECTION 45-5-505, MCA;"

6. Page 2, line 15.
Following: "~~spouse~~"
Insert: "person"

7. Page 3, line 10.
Following: "another"
Insert: "person"

8. Page 5, line 19.
Strike: "40"
Insert: "20"

9. Page 7, line 7.
Following: "~~(b)~~"
Insert: "evidence of the victim's past sexual conduct with the offender or"

2.25
2-18-91
JDB

10. Page 25, line 8, through page 27, line 2.
Strike: section 9 in its entirety
Renumber: subsequent sections

11. Page 29, line 8, through page 34, line 10.
Strike: sections 12 through 15 in their entirety
Renumber: subsequent sections.

12. Page 36, lines 13 and 14.
Strike: section 18 in its entirety
Insert:

"Section 13. Section 45-5-505, MCA, is amended to read:

"45-5-505. ~~Deviate sexual conduct~~ Bestiality. (1) A person who knowingly engages in ~~deviate sexual relations~~ bestiality or who causes another to engage in ~~deviate sexual relations~~ bestiality commits the offense of ~~deviate sexual conduct~~ bestiality.

(2) A person convicted of the offense of ~~deviate sexual conduct~~ bestiality shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) ~~A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both~~ For purposes of this section, "bestiality" means any form of sexual contact or of sexual intercourse with an animal.""

Ex. 2
2-16-91
HB 451

Insert:

"**Section 13.** Section 45-5-505, MCA, is amended to read:

"**45-5-505.** ~~Deviate sexual conduct~~ Bestiality. (1) A person who knowingly engages in ~~deviate sexual relations~~ bestiality or who causes another to engage in ~~deviate sexual relations~~ bestiality commits the offense of ~~deviate sexual conduct~~ bestiality.

(2) A person convicted of the offense of ~~deviate sexual conduct~~ bestiality shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) ~~A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both~~ For purposes of this section, "bestiality" means any form of sexual contact or of sexual intercourse with an animal.""

EXHIBIT 3
DATE 2-16-91
HB 451

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 2-16-91 **BILL NO.** HB 451 **NUMBER**

MOTION: Rep. Measure Amendment changing 20 back to 10.

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR		✓
REP. ARLENE BECKER	✓	
REP. WILLIAM BOHARSKI		✓
REP. DAVE BROWN	✓	
REP. ROBERT CLARK		✓
REP. PAULA DARKO		✓
REP. BUDD GOULD		✓
REP. ROYAL JOHNSON		✓
REP. VERNON KELLER		✓
REP. THOMAS LEE		✓
REP. BRUCE MEASURE	✓	
REP. CHARLOTTE MESSMORE	✓	
REP. LINDA NELSON	✓	
REP. JIM RICE	✓	
REP. ANGELA RUSSELL		✓
REP. JESSICA STICKNEY		✓
REP. HOWARD TOOLE	✓	
REP. TIM WHALEN	✓	
REP. DIANA WYATT		✓
REP. BILL STRIZICH, CHAIRMAN	✓	
TOTAL	9	11

EXHIBIT 4
DATE 2-16-91
HB 451

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 2-16-91 **BILL NO.** HB 451 **NUMBER**

MOTION: Rep. Measure amendment reinstating lines 11-20 on page 6.

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR		—
REP. ARLENE BECKER		—
REP. WILLIAM BOHARSKI	—	—
REP. DAVE BROWN		—
REP. ROBERT CLARK	—	—
REP. PAULA DARKO		—
REP. BUDD GOULD		—
REP. ROYAL JOHNSON		—
REP. VERNON KELLER	—	
REP. THOMAS LEE	—	
REP. BRUCE MEASURE	—	
REP. CHARLOTTE MESSMORE	—	
REP. LINDA NELSON	—	
REP. JIM RICE	—	
REP. ANGELA RUSSELL		—
REP. JESSICA STICKNEY		—
REP. HOWARD TOOLE		—
REP. TIM WHALEN	—	
REP. DIANA WYATT		—
REP. BILL STRIZICH, CHAIRMAN		—
TOTAL	8	11

EXHIBIT 5
DATE 2-16-91
HB 431

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 2-16-91 **BILL NO.** HB#431 **NUMBER** _____

MOTION: Rep. Measure amend

PASSED

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR		/
REP. ARLENE BECKER		/
REP. WILLIAM BOHARSKI	/	
REP. DAVE BROWN	/	
REP. ROBERT CLARK	—	—
REP. PAULA DARKO		/
REP. BUDD GOULD		/
REP. ROYAL JOHNSON		/
REP. VERNON KELLER	/	
REP. THOMAS LEE	/	
REP. BRUCE MEASURE	/	
REP. CHARLOTTE MESSMORE	/	
REP. LINDA NELSON	/	
REP. JIM RICE	/	
REP. ANGELA RUSSELL		/
REP. JESSICA STICKNEY		/
REP. HOWARD TOOLE		/
REP. TIM WHALEN	/	
REP. DIANA WYATT		/
REP. BILL STRIZICH, CHAIRMAN	/	
TOTAL	10	9

EXHIBIT 6
DATE 2-16-91
HB 451

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL VOTE

DATE 2-16-91 **BILL NO.** 451 **NUMBER** _____

MOTION: Rep. Brooke DPA.

NAME	AYE	NO
REP. VIVIAN BROOKE, VICE-CHAIR	X	
REP. ARLENE BECKER	X	
REP. WILLIAM BOHARSKI		X
REP. DAVE BROWN	X	
REP. ROBERT CLARK	X	
REP. PAULA DARKO	X	
REP. BUDD GOULD		X
REP. ROYAL JOHNSON	X	
REP. VERNON KELLER		X
REP. THOMAS LEE		X
REP. BRUCE MEASURE	X	
REP. CHARLOTTE MESSMORE		X
REP. LINDA NELSON	X	
REP. JIM RICE		X
REP. ANGELA RUSSELL	X	
REP. JESSICA STICKNEY	X	
REP. HOWARD TOOLE	X	
REP. TIM WHALEN		X
REP. DIANA WYATT	X	
REP. BILL STRIZICH, CHAIRMAN	X	
TOTAL	13	7

Ex. 2
2-16-91
HB 451

nsert:

"Section 13. Section 45-5-505, MCA, is amended to read:

"45-5-505. ~~Deviate sexual conduct~~ Bestiality. (1) A person ho knowingly engages in ~~deviate sexual relations~~ bestiality or ho causes another to engage in ~~deviate sexual relations~~ estiality commits the offense of ~~deviate sexual conduct~~ estiality.

(2) A person convicted of the offense of ~~deviate sexual onduct~~ bestiality shall be imprisoned in the state prison for ny term not to exceed 10 years or be fined an amount not to xceed $50,000, or both.

(3) ~~A person convicted of deviate sexual conduct without onsent shall be imprisoned in the state prison for any term not o exceed 20 years or be fined an amount not to exceed $50,000, r both~~ For purposes of this section, "bestiality" means any form f sexual contact or of sexual intercourse with an animal.""

Senator Svrcek asked if applicants must apply in the county in which they reside. Representative Brown replied they do (Section 3, page 10). He stated that a permit may be revoked if circumstances arise indicating revocation, and that the drafters tried to make this language unique to the situation in Montana.

Closing by Sponsor:

Representative Brown asked that Senator Jacobson carry HB 825, and that Senator Pinsoneault carry it if she cannot.

HEARING ON HOUSE BILL 451

Presentation and Opening Statement by Sponsor:

Representative Vivian Brooke, District 56, said HB 451 would generally revise laws concerning sex crimes. She stated she believes it would strengthen the Code concerning crimes with victims, and would clarify what "we call crimes" without victims. She provided a proposed amendment (Exhibit #4).

Proponents' Testimony:

Holly Franz, Womens Law Section of the State Bar Association, strongly urged the Committee to support HB 451. She read from prepared testimony and provided an amendment (Exhibits #5 and #6), and said the amendment is somewhat complicated.

Ms. Franz stated there is no reason for Section 1 now, and commented that Senator Crippen carried a bill in 1985 eliminating the crime of spousal rape (Section 2). She further stated that Section 3 is covered in HB 211 (Representative Bradley), and Section 4 covers indecent exposure. Ms. Franz said Section 5 is an incest provision, and commented that the current penalty is one-half of what it is for other rape. She stated that Section 6 addresses "date rape", and said Montana law is unique in this area as each sexual assault is looked at on an individual basis.

Ms. Franz continued, and said Section 7, defining sex, removes sexual deviate acts. She stated that 45-2-101, MCA, provides general definitions (pages 7-24). and that Sections 8-17 are miscellaneous renumbered provisions which have nothing to do with the bill. Ms. Franz further stated that section 18 is the repealer of deviant sexual acts.

Ms. Franz told the Committee that HB 451 only affects consensual adult homosexual sex, and that 25 states have adopted similar legislation. She said the American Bar has recommended decriminalization of consensual adult homosexual sex, as no one is harmed. Ms. Franz further stated there is no textual privacy guarantee in the U.S. Constitution, as in the Montana Constitution. She told the Committee that science has indicated that people have no control over this preference, and that most county attorneys

will not bring this crime. Mr. Franz commented that Missoula County believes it is unconstitutional, and said John Connor, Department of Justice, was present to answer questions.

Reverend Gary Hawk, Pastor, Plymouth Congregational Church, Helena, read from a prepared statement. He said the United Church of Christ ordains people without reference to their sexuality, and that he recently worked with a family whose husband/father did not advised them until he was dying and had exposed them to the disease, that he had AIDS. Reverend Hawk stated he believes these are people who need understanding and testing, but are driven by fear to hide.

Bruce Desonia, Department of Health and Environmental Sciences (DHES), read from a prepared statement in support of the bill (Exhibit #5). He said his statutory duties include monitoring and preventing human immuno-deficiency viruses. He said a barrier occurs when a "gay" man goes to DHES for health screening because he might refuse to identify his sex partners. He referred to the book, No Magic Bullet by Allen Brandt.

Steve Simpson read from a prepared statement in opposition to HB 451 (Exhibit #6).

Aylee Hendricks, told the Committee she is a date rape survivor, and that she believes her case was not taken seriously by the law. She read from a prepared statement, and said her assailant was not prosecuted. Ms. Hendricks said she believes date rape victims need support and protection of the legal system, and urged the Committee to support the bill.

Representative Tom Lee, District 49, said he supported the bill, as amended, as well as Steve White's remarks concerning health decriminalization. He said he believes it, "will open the door to the rest of the homosexual agenda, if not passed in amended form".

Opponents' Testimony:

There were no opponents of the bill.

Questions from the Committee:

Chairman Pinsoneault refuted the statement that no harm is done to the community by this legislation. He paraphrased Justice Berger's comments in the Georgia case (Exhibit #7), and said Laguna Beach, California has the highest incidence of AIDS in the nation. He restated that to suggest there is no harm is absolutely false. Holly Franz replied there is no cure for AIDS, and that the best way is prevention and education. She stated that, right now, HIV-positive people are defined as felons under Montana law.

Chairman Pinsoneault further stated that the Constitution speaks to dignity of human beings, but he is bothered by what goes

on behind closed doors, and the slime that leaks out into the community.

Senator Crippen asked Reverend Hawk if he realized it would not be against the law to have sex with an animal under this bill. Reverend Hawk replied he did not support bestiality.

Senator Crippen commented to Reverend Hawk that he said he supported HB 451. He asked Reverend Hawk where he is coming from. Reverend Hawk replied that he had said earlier that continuing to prosecute for same-sex relations and bestiality is not helpful.

Senator Crippen asked Reverend Hawk if he went along with eliminating sex with animals from the bill. Reverend Hawk replied he did not.

Senator Crippen asked Reverend Hawk to repeat the four methods he used in determining his support of this bill. Reverend Hawk replied he was trying to discern the will of God by relying on the Bible, cultural context, personal experience, and the history of the church.

Senator Crippen said he would challenge this method, and commented that Reverend Hawk was acting like the Pharisees in the Bible.

Senator Yellowtail stated that he believed the previous two lines of questioning were inappropriate. Senator Towe agreed, and Chairman Pinsoneault disagreed.

Senator Doherty asked how many times in the past ten years a county attorney has prosecuted for deviant sexual conduct. John Connor replied there was one incident, but the original charge was disposed of under another section of law. He stated he was not aware of any other cases.

Senator Doherty asked if this type of charge is sent to the Department of Justice. John Connor replied he is always in contact with county attorneys.

Senator Rye stated that this is a situation where a little hypocrisy in the law might be a good idea, and asked for John Connor's opinion on this. Mr. Connor replied he is present as a representative of the Montana County Attorneys, and believes this is a policy decision of the Legislature.

Senator Rye asked if this bill would be valid, from a legal point of view, if it were to pass. John Connor replied it would be, except for non-consensual sex.

Senator Svrcek said he echoed Senator Yellowtail's comments. He commented that he was concerned about rocky relationships between spouses, and whether one spouse could complain that the other spouse was engaging in indecent exposure by going around

their home clad only in underwear. Holly Franz replied that she didn't believe strolling around in the home is indecent exposure, unless there was someone else in the home would could be offended.

Senator Towe asked if rape isn't a separate offense to incest, and if incest is as serious a crime, particularly if it is consensual. John Connor replied that there could be a charge of rape, but prosecution could charge incest when there are acts of sexual intercourse between step-daughter and step-father, but there is no proof of penetration.

Senator Towe asked for comments on the House reinserting Section 6, evidence of past sexual conduct. John Connor replied that he liked the bill in its original form, and believes the amendments "mushes" up the issues.

Senator Towe asked why subsection (2) was stricken from the bill. John Connor replied it is not needed now.

Closing by Sponsor:

Representative Brooke said HB 451 is a difficult bill, and that people get uncomfortable with it. She stated it simply provides for civil rights and decriminalization, and is not an attempt to advance the homosexual agenda. Representative Brooke suggested amending divorce and getting it out of the Code. She said the Montana and U.S. Constitutions guarantee the right of privacy and that all citizens be treated equally under the law.

Representative Brooke told the Committee that 45-5-505, MCA, increases the fear of convicted felons, and said she hoped the Committee would not kill the bill. She stated there are several problems which need to be defined in the law, and commended the victim of date rape on her courage in testifying before the Committee.

Representative Brooke challenged the Committee to set aside prejudice, and to pass the bill as introduced.

ADJOURNMENT

Adjournment At: 11:30 a.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

JU032891.SM1

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 28 Mar 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

6

HB 451
28 Mar 91

HOUSE BILL 451

TESTIMONY OF THE WOMEN'S LAW SECTION OF THE STATE BAR

My name is Holly Franz. I am the President of the Women's Law Section of the State Bar. The Women's Law Section is an organization of more than 100 attorneys who are concerned about the effect of Montana's laws on women. The Women's Law Section strongly urges support of HB 451.

HB 451 is a general revision of the sexual crimes act. It is designed to conform penalities for all rapes, to eliminate spousal exceptions, to redefine force to include the threat of retaliatory action, to repeal the crime of sexual deviate conduct, and to recognize the crime of date rape. My testimony will concentrate on the repeal of the deviate sex act. Amy Pfeifer of the Women's Law Section will address the date rape provisions.

House Bill 451 was amended by the House to delete the provisions which repeal the deviate sex act and decriminalizes consensual adult homosexual sex. In an attempt to solely address public health concerns, the House amended the deviate sex act to prohibit introducing evidence of HIV testing and treament in criminal prosecutions. This amendment is completely inadequate. It disregards the many reasons to decriminalize homosexuality and will not have the desired public health effect. We ask that you restore the bill's original provision to decriminalize homosexuality.

Several of the provisions in HB 451 have already been addressed by other legislation. Representative Tom Lee's HB 113 redefines force to include the threat of substantial retaliatory action. HB 113 was passed by both the House and Senate and is awaiting the governor's signature. Section 1 of HB 451 also redefines force. Because this is already addressed by HB 113, we ask that you amend this section out of HB 451.

Representative Dorothy Bradley's HB 211 conforms the penalties for heterosexual and homosexual rape. HB 211 was passed by the House and referred to the Senate Judiciary Committee. Section 3 of HB 451 also conforms these penalties.

Conform penalties: Representative Dorothy Bradley's HB 211 has already conformed the penalties for heterosexual and homosexual rape. The maximum prison term for heterosexual and homosexual rape is 10 years. If the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury, then the maximum prison term is 20 years.

The maximum prison penalty for incest is 10 years or 20 years if the victim is less than 16 years old and the offender is 3 or more years older, or the offender inflicts bodily injury. The crime of incest includes sexual intercourse with a family member. As the law now stands, the maximum penalty for incestual rape is one-half of the penalty for non-incestual rape. Section 5 of HB 451 conforms these maximum penalties.

The maximum rape penalty should not differ depending upon the identity of the victim. HB 451 does not suggest that the maximum prison sentence should be imposed against all rapists or against all persons guilty of incest. The crime of incest includes, in addition to rape, the act of knowingly marrying, cohabiting with, or having sexual contact with an ancestor or descendant. In many situations the maximum penalty would not be appropriate. In those situations, however, where it is appropriate, a sentencing judge should have the discretion to sentence the offender to the maximum prison penalty regardless of the identity of the victim.

Spousal exceptions: Montana law originally did not define spousal rape or sexual assault as a crime. The 1985 legislature, in recognition of the serious problem of domestic abuse, removed the spousal exception from the rape law. Sections 2 and 4 remove the spousal exceptions from the crimes of sexual assault and indecent exposure. There are many situations when the crime of sexual assault or indecent exposure, which requires the causing of affront or alarm, could be an element of domestic abuse. In those situations, the conduct should be defined as criminal.

Date rape: Section 6 of HB 451 addresses the problem of date rape. Under current Montana law, if a person is raped while mentally incompetent to consent to sex, the offender is not guilty if the victim was a voluntary social companion of the offender and the alcohol was voluntarily consumed. A person is mentally incapacitated if she is temporarily incapable of appreciating or controlling her conduct due to alcohol. If an offender

rapes someone in this condition, it should not matter who the victim was drinking with.

Section 6 of HB 451 also amends the rape shield law. In most situations, a victim's past sexual history is inadmissible in rape trials. Montana law does, however, allow evidence of the victim's past sexual conduct with the offender. HB 451 would disallow such evidence except to show the origin of semen, pregnancy, or disease at issue in the prosecution. The fact that a person has consented to sex in the past is not consent to unlimited sex. Each sexual encounter should be judged on its own merit. If the statutory elements of rape, including the threat of violence or retaliatory action, are present, then a rape has occurred regardless of the victim and offender's past sexual relations.

Deviate Sex: Section 18 of HB 451 repeals the crime of deviate sexual conduct. Because Representative Dorothy Bradley's HB 211 has already incorporated nonconsensual deviate sex into the rape statute, HB 451 need only address consensual deviate sex. Deviate sex is defined to include all sexual contact or sexual relations between members of the same sex. It applies to the private sexual conduct of consenting adults.

At least 25 states, including Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinios, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, Washington, West Virginia, Wisconsin and Wyoming, have decriminalized consensual homosexual activity. In the last year, lower courts in Texas, Michigan and Kentucky struck down deviate sex statutes on privacy grounds. The Model Penal Code, adopted by the American Law Institute, and the American Bar Association recommend the decriminalization of consensual homosexual conduct. The Model Penal Code's reasons for decriminalization are adult consensual homosexual sex causes no harm to the community; existing law is substantially unenforced and is used primarily for harrassment; and such laws violate personal privacy. The Model Penal Code was the catalyst for change in many states.

While most of the states acted legislatively, a number of state courts have ruled such statutes unconstitutional as a violation of the right to privacy and equal protection. The U.S. Supreme Court ruled in 1986 that deviate sex statutes do not violate the federal

right of privacy. The statute may, however, violate Montana's constitution. Montana's constitution, unlike its federal counterpart, expressly provides a right to privacy. The right to privacy typically protects private sexual acts between consenting adults. It is very likely that Montana's deviate sex act is unconstitutional under Montana's Constitution.

Montana's deviate sex act may also be unconstitutional because it criminalizes behavior based on an immutable trait. Scientific research indicates a person has little control over his or her sexual orientation and that once acquired, sexual orientation is largely impervious to change. In 1973, The American Psychiatric Association removed homosexuality from its list of psychic disorders. The American Medical Association followed suit in 1975 by endorsing the decriminalization of homosexual conduct between consenting adults.

Due to unresolved constitutional questions, many county attorneys will not file charges under the deviate sex act. For example, Missoula County has a policy of not enforcing this law because it believes the law is unconstitutional and it has no interest in prosecuting private, consensual adult sex acts. Nonetheless, the fear of felony charges has hindered county health efforts. HIV positive male homosexuals are hesitant to disclose their sexual partners because it implicates them and their partners in the commission of a felony. The deviate sex act, rather than deterring homosexuality, deters AIDS prevention and treatment. The house amendments do nothing to address this problem.

The deviate sex act should be repealed. It is arguably unconstitutional. It criminalizes an entire class of people based on unchangeable traits. It is not enforced, and it impairs public health concerns. It is a bad law that should be repealed.

The Women's Law Section urges support of HB 451. (The opinions of the Women's Law Section are its own and do not necessarily reflect the opinion of the State Bar of Montana.)

Ex 6
3/28/91
HB 451

March 28, 1991

To: Senate Judiciary Committee

From: Women's Law Section, State Bar of Montana

Subject: HB 451, An Act to Generally Revise the Laws Relating to Sexual Crimes

At the outset I must state that the following is the position of the Women's Law Section of the State Bar of Montana, and not necessarily that of the State Bar of Montana.

The Women's Law Section of the State Bar of Montana wholeheartedly supports HB 451. Prior to the beginning of the session, the provisions of this bill were determined by the Women's Law Section to be one of our priorities for this session.

As Holly Franz has addressed the other provisions of the bill, I am only here to testify regarding the proposed amendments to subsections (3) and (4) of MCA 45-5-511.

After reviewing the criminal law of many states relating to the issues of consent and admissibility of evidence in the prosecution of sexual intercourse without consent and sexual assault cases, the Women's Law Section believes the changes proposed to these subsections are entirely appropriate and necessary.

Of the fifteen states and the 1962 Model Penal Code examined, not one provided a voluntary social companion defense. Not one provided, as we do, that a victim, by accepting a date with the defendant, and voluntarily drinking alcohol with him, is not entitled to the protection of the criminal law when she is raped or sexually assaulted. A woman, or man, who accepts a date, or perhaps is introduced to someone at a party is not consenting to sexual intercourse or sexual contact any more than is a person who is attacked in her home by a stranger. These victims, voluntary social companions, are entitled to protection of our criminal laws; they are entitled to the removal of this provision as a defense to these crimes. Those that commit the crimes of sexual intercourse without consent, sexual assault and indecent exposure should be held accountable for their acts.

In the same way, a victim who has once consented to sexual intercourse or sexual contact with the defendant in the past, has not forever waived her right to withhold consent in the future. A lack of consent for any particular act is rape, or sexual assault. It is for this reason that we propose the deletion of current subsection (4) of MCA 45-5-411. Each act/occurrence should be evaluated on whether consent was given at that time.

On behalf of the victims of these offenses, we ask for your support and urge passage of HB 451.

Ex 2a
26 Mar 91
HB 451

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

STAN STEPHENS, GOVERNOR

COGSWELL BUILDING

STATE OF MONTANA

FAX # (406) 444-2606

HELENA, MONTANA 59620

TESTIMONY ON HB 451 - 3/28/91

Mr. Chairman and members of the Senate Judiciary Committee, I am Bruce Desonia, past President of the Montana Public Health Association and current Program Manager of the AIDS/STD Program within the Preventive Health Services Bureau of the Montana Department of Health and Environmental Sciences. Our Department's statutory duties include "to make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public." [50-1-202,(2),MCA].

I wish to discuss our Department's views on a portion of this bill. That portion reinstates the penalty for consensual sex between adults of the same sex, or "deviate sexual relations." It is our belief that this portion negatively affects objectives in our AIDS/STD Program.

The primary mission of our program is to monitor and prevent the spread of the Human Immunodeficiency Virus (HIV) epidemic in Montana, which involves our support of counseling, testing, referral, and partner notification services. This is an opportunity to invite persons with high risk behavior (or other concerns regarding AIDS) to have counseling with a trained professional on ways to reduce their risk, identify their HIV serologic status, and prevent spread to others. A significant number of men having sex with men will not seek testing if there is a chance their identity may be revealed. The ammendments to this bill passed in the House may have reduced the fear of prosecution, but not the fear of persecution.

Many who do present for testing are less willing to identify themselves as gay, because to do so would be admitting they are a criminal. This fact reduces the validity of the risk behavior information we collect about those tested for HIV. It may also adversely affect the health and medical treatment of individuals, who do not tell their personal physicians about their sexual orientation. There is also opposition to named reporting for HIV for these same reasons and therefore we have less accurate information on how the epidemic is spreading in Montana. Public health is a public trust.

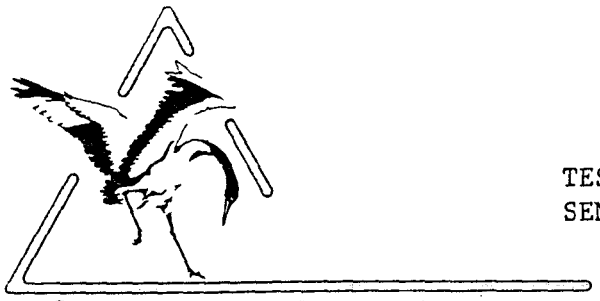
A third barrier posed under the current law and present bill occurs when a gay man does present to a health care provider for counseling and testing. Traditional public health work involves the ability to cooperatively discuss with the HIV-infected patient, the risk posed to his or her sex or needle sharing partners. Men having sex with men are not likely to reveal sex partners, when to do so would identify their partner as a felon. If the source patient is unable or unwilling to notify their partners of their partner's risk for HIV, the health department or other health care provider has an obligation to offer these referral services confidentially.

Allen Brandt, Professor of the History of Medicine and Science at Harvard Medical School writes in No Magic Bullet in 1987,

> AIDS demonstrates how economics and politics cannot be separated from disease; indeed, these forces shape our response in powerful ways. In the years ahead we will learn a great deal more about AIDS and how to control it. We will also learn a great deal about the nature of our society from the manner in which we address the disease. AIDS will be a measure upon which we may calibrate not only our medical and scientific skill but our capacity for justice and compassion.

MDHES supports decriminalizing consensual same sex behavior as originally presented in the introduced bill.

Bruce Desmond



OUT • IN • MONTANA

EXHIBIT 6a
HB 451
3/28/91

TESTIMONY OF STEVE ~~SIESON~~ SIMPSON,
SENATE JUDICIARY COMMITTEE
H.B. 451
(March 28, 1991)

Mr. Chairman, members of the Senate Judiciary Committee: My name is Steve Simpson. I currently live in Missoula, but I grew up in Helena and graduated from Helena High School where I was regarded as a track star, top student, and a student leader. As a Boy Scout I achieved every possible rank and award available, including the Eagle Scout Badge.

After graduation I attended both the University of Montana and Montana State University, where I graduated in 1988. As an athlete I received numerous All Conference and national honors. I was also praised for my leadership abilities, not only in athletics, but alson in student organizations. I held the position of team captain and I served as president of a student organization.

I have always enjoyed working with young people. I spent my summers working at various camps around the state: Diamont, for diabetic kids; Athletes-In-Action; and I worked as camp director at the YMCA's Camp Child. I have always been an advocate for volunteerism and have spent a great deal of my time at college working with Eaglemont, an organization that plans activities for disabled youth, and I organized the Bobcat Track Club for young athletes.

Now I spend a great deal of time running a hotline answering up to 15 to 20 phone calls per day. People concerned about AIDS, sexuality, support groups, and safer sex information call me for answers and referral. I have talked with teenagers about the risks of being sexually active at 14 or 15. I've talked with mothers and fathers who realize their homosexual feelings only after denying them for years and can't discuss them with their families. I've talked with people, including teens, who are considering suicide as an answer to the fear they feel because they are homosexual.

Out In Montana, Inc.
15 N. HIGGINS, SUITE #110 ~~44 North Last Chance Gulch, Suite #47, P.O. Box 954, Helena, MT. 59624~~ P.O. BOX 8661
~~(406) 442-1784~~ 1-800-366-GAYS
(406) 542-6601

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I am effective talking to these peole about these very difficult topics. I am effective because I am an openly gay man. Most of these people won't call state or county health departments because they want to talk with someone who has also been ridiculed, discrimnated against, rejected by family and friends, and even physically assaulted because of who we are.

I was hired for these qualifications, including that of being a gay man, under a state contract. Yet, I am also a felon by Montana state law. An amendment to protect those seeking medical treatment won't protect me from criminal prosecution, even though my job essentially requires that I be openly gay.

A national estimate of people who have exposed to the AIDS virus is over 1 percent. In our region it is estimated to be slightly less than that . . . about .7 percent. That means that between 5,000 and 6,000 Montanans may already be HIV positive.

We can no longer look at this subject as a moral issue. It is a health issue. Its is a civil rights issues. And it is time that we deal with it as such.

Thank you.

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[478 US 186]

MICHAEL J. BOWERS, Attorney General of Georgia, Petitioner

v

MICHAEL HARDWICK, and JOHN AND MARY DOE

478 US 186, 92 L Ed 2d 140, 106 S Ct 2841, reh den (US) 92 L Ed 2d 779, 107 S Ct 29

[No. 85-140]

Argued March 31, 1986. Decided June 30, 1986.

Decision: Due process clause of Fourteenth Amendment held not to confer fundamental right on homosexuals to engage in consensual sodomy, even in privacy of home.

SUMMARY

A Georgia statute made it a criminal offense, punishable by up to 20 years' imprisonment, to commit sodomy, which it defined as performing or submitting to any sexual act involving the sex organs of one person and the mouth or anus of another. After a homosexual was charged with violating the statute by committing sodomy with a consenting male adult in the bedroom of his home, and after the district attorney had decided not to prosecute unless further evidence developed, the homosexual brought suit in a Federal District Court challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The District Court granted a motion by the defendants, the state attorney general and others, to dismiss the action for failure to state a claim. The United States Court of Appeals for the Eleventh Circuit, however, reversed and remanded for trial, holding (1) that the statute violated the homosexual's fundamental right to privacy, protected by the Ninth Amendment and by the due process clause of the Fourteenth Amendment; and (2) that the state, in order to prevail at trial, had to prove that it had a compelling interest in regulating such behavior and that the statute was the most narrowly drawn means of achieving that end (760 F2d 1202).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals. In an opinion by WHITE, J., joined by BURGER, Ch. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., it was held that the due process clause of the Fourteenth Amendment does not confer any fundamental right on homosexuals to engage in acts of consensual sodomy.

Briefs of Counsel, p 839, infra.

while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[8]

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante*, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

[8]Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

and the Western Christian Tradition 70–81 (1975). Duri
the English Reformation when powers of the ecclesiasti
courts were transferred to the King's Courts, the first E
lish statute criminalizing sodomy was passed. 25 Hen. VI
ch. 6. Blackstone described "the infamous *crime against*
ture" as an offense of "deeper malignity" than rape, a hein
act "the very mention of which is a disgrace to human
ture," and "a crime not fit to be named." 4 W. Blackstc
Commentaries *215. The common law of England, includ
its prohibition of sodomy, became the received law of Geo
and the other Colonies. In 1816 the Georgia Legislat
passed the statute at issue here, and that statute has b
continuously in force in one form or another since that ti
To hold that the act of homosexual sodomy is somehow p
tected as a fundamental right would be to cast aside mille
of moral teaching.

This is essentially not a question of personal "preferenc
but rather of the legislative authority of the State. I
nothing in the Constitution depriving a State of the powe
enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the C
that there is no fundamental right—*i. e.*, no substantive r
under the Due Process Clause—such as that claimed by
spondent Hardwick, and found to exist by the Court of
peals. This is not to suggest, however, that respondent
not be protected by the Eighth Amendment of the Cons
tion. The Georgia statute at issue in this case, Ga. C
Ann. § 16–6–2 (1984), authorizes a court to imprison a pe
for up to 20 years for a single private, consensual act of s
omy. In my view, a prison sentence for such conduct—
tainly a sentence of long duration—would create a seri
Eighth Amendment issue. *Under the Georgia statute a s*
gle act of sodomy, even in the private setting of a home, i

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WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 28th day of March, 1991.

Name: Aylee Hinderks Bill #451

Address: 1616 5th St. NW

Great Falls, MT

Telephone Number: 452-7657

Representing whom?

Self

Appearing on which proposal?

451

Do you: Support? X Amend?____ Oppose?____

Comments:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Exhibit 8
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Aylee Hinderks
1616 5th St. NW
Great Falls, MT
March ~~22~~ 28, 1991

My name is Aylee Hinderks and I am a date rape survivor. I hope that by now we all understand that rape is a devastating crime, one from which it takes an infinite amount of time from which to heal. I also hope we all understand how traumatic the rape victim's experience with police and courts can be. What we may not understand is that for the victim of date rape this experience is often much worse.

Date rape is not taken seriously by many police and prosecuters. Over two years ago I was raped by a boy I was dating. We reported the rape to the police and provided them with a list of witnesses who could testify that I had been suffering from rape trauma syndrome. The police took my statement. Several weeks later they requested I take a polygraph test, which I did. Then, without interviewing any of the witnesses or talking with my attacker, they closed their "investigation" and forwarded my case to the county attorney.

Repeated calls to youth court and the prosecuter's office brought only pleas for patience. They were busy, but would get to my case as soon as possible. They requested no additional investigation. Five months after the county attorney's office received my file they called me for the first time; they were dropping my case. It would be too expensive to prosecute and no one would believe me anyway.

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We were so angry that a meeting was arranged to discuss what had gone wrong. The chief of police, county attorney and head of youth court services attended. They determined that the investigation needed to be completed before any decision could be made regarding prosecution.

All the witnesses were finally interviewed and the person who raped me was finally brought in for questioning, thirteen months after the rape was reported. The file was then sent back to the county attorney's office. That was in August of 1990. I have yet to hear one word from them. Our letters have gone unanswered.

After two years of this nonsense I have had nothing but false hopes. Rape and the legal system have changed my life forever. My family and the people I care about have been affected but the rapist has not.

For myself, the healing process is a daily battle that has been unnecessaily prolonged because even the satisfaction of justice has never been granted to me.

Today I wish to make it clear to you that when a person has been the victim of date rape they need the support and protection of the legal system, not its indifference. I believe the passage of this bill will help to impress upon law enforcement the seriousness of all crimes of sexual abuse, and for this reason I appeal to you to vote in favor of its passage.

Thank you.

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ACLU OF MONTANA
AMERICAN CIVIL LIBERTIES UNION

P. O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086

State Office
335 Stapleton Building
Billings, Montana 59101

BOB ROWE
President

SCOTT CRICHTON
Executive Director

JEFFREY T. RENZ
Litigation Director

March 28, 1991

Mr. Chairman, Members of the Committee:

For the record, my name is Scott Crichton, executive Director of the ACLU of Montana. I am here to go on record today supporting HB 451 as it was originally proposed. It is my hope that this committee will see the wisdom and justice in restoring the language that would repeal Montana's deviate sexual conduct law.

Montana should repeal it's deviate sexual conduct statute for a number of reasons fully articulated in the written testimony that I am submitting. In addition to the critique of why this invavsive, vague, unconstituional and unenforceable law should be removed from the bocks, I am also supplying additional materials for the committee's consideration. These include the:

- American bar Association Resolution Urging Repeal of Sodomy Laws;
- An Amicus Brief from numerous churches in Bowers v. Hardwick asserting, among other things, the established rights of intimate association between consensual adults and the sanctity of the home;
- An Amicus Brief in the same case from the American Psychological Association and the American Public Health Association;
- A Washington Post article from last October about Justice Powell's regreting his swing vote in Bowers v. Hardwick;
- The American Law Institute Model Penal Code ~207 Comment.

Obviously, all sides of this issue have arguments for your consideration. You have heard testimony from the ACLU on numerous occassions this session relating to the rights of privacy in Montana. I urge you to do the right thing on this fundamental civil rights and civil liberties issue by restoring the original language to HB 451. Just as we today look back to the blindness and cruelty of our nations' racism of earlier decades, I suggest to you, we will soon be looking back to the days of homophobia with twinges of guilt and disbelief at our callousness and narrowness of thought. I hope you will demonstrate your leadership in helping us move into a time when we treat all citizens with fundamental dignity and respect and move beyond trying to legislate and regulate the private affairs of our citizenry.

"Eternal vigilance is the price of liberty"

MONTANA SHOULD REPEAL ITS DEVIATE SEXUAL CONDUCT LAW

1. THE MONTANA DEVIATE SEXUAL CONDUCT LAW VIOLATES THE STATE CONSTITUTION'S RIGHT TO PRIVACY.

The Montana state constitution has one of the strongest guarantees of the right to privacy in the United States. Mont. Const., Art. II, § 10 states that, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." In interpreting this clause, the Montana Supreme Court has employed a two part test: (1) whether the person involved has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. See Flesh v. Bd. of Tr. of J. School Dist. 2., 786 P.2d 4, 8 (Mont. 1990).

An adult individual engaging in consensual, sexual behavior in the privacy of his or her home clearly has a subjective expectation of privacy in doing so. Second, that expectation is "reasonable," in that society recognizes the home as sacrosanct and private activities which go on within the home without affecting other individuals society recognizes as being beyond the state's control. See, e.g., Stanley v. Georgia, 394 U.S. 557 (1969). Thus, prosecution of someone for private, adult, consensual behavior would violate this constitutional protection.

Employing similar logic, in 1990, three state courts -- in Michigan, Kentucky, and Texas -- struck down their state sodomy statutes on the grounds that these statutes violated their state constitution's right to privacy.

Moreover, because Montana's privacy provision is broader than that contained within the federal constitution, see, e.g., Montana Human Rights Div. v. City of Billings, 649 P.2d 1283 (Mont. 1982), the United States Supreme Court's opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld Georgia's sodomy statute, is inapposite. The Montana constitution requires a "compelling state interest" for invasions of privacy, while the Hardwick court subjected Georgia's sodomy law only to a rational relationship test. Accordingly, as with the three state decisions mentioned above, the Hardwick decision would not bar a finding that application of the deviate sexual conduct law to private, consensual, adult sexual behavior would run afoul of the Montana state constitution's right to privacy.

2. THE MONTANA DEVIATE SEXUAL CONDUCT LAW IS UNCONSTITUTIONALLY VAGUE.

In addition to violating the constitutional right to privacy, the deviate sexual conduct law violates the constitution because it is vague. The deviate sexual conduct law does not define what is meant by deviate sexual conduct and therefore gives an individual no notice

of what activities are prohibited. Such broad and sweeping criminal prohibitions are unconstitutionally vague and could not be enforced.

3. THE MONTANA DEVIATE SEXUAL CONDUCT LAW VIOLATES THE EQUAL PROTECTION CLAUSE OF THE STATE AND FEDERAL CONSTITUTIONS.

Article II, Section 4, of the Montana constitution states that: "The dignity of the human being is inviolable. No person shall be denied equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."

Montana's deviate sexual conduct law violates this norm because it criminalizes certain conduct only when performed between individuals of the same gender. Accordingly, it discriminates on the basis of sex (if a man engages in sexual conduct with a woman, that is not criminal, but if a women does, that conduct is criminal), and it discriminates on the basis of sexual orientation (only homosexual and not heterosexual conduct is proscribed). This discriminatory basis of the law renders it violative of the state constitution and of the Fourteenth Amendment to the United States constitution.

4. THERE IS NO CONTEMPORARY CONSENSUS ABOUT THE MORALITY OF DEVIATE SEXUAL CONDUCT: MANY RELIGIONS IN THE UNITED STATES DO NOT BELIEVE THAT THE STATE SHOULD CRIMINALIZE PRIVATE, ADULT, CONSENSUAL SEXUAL CONDUCT.

There is not a contemporary consensus that private, adult, consensual sexual behavior is immoral. Many religious denominations do not believe that private, consensual, adult sexual relations should be regulated by the state. For example, in adopting its 1973 position calling for the repeal of sodomy laws, the American Bar Association quoted the Council of the Episcopal Diocese of New York:

> In matters of private morality, the State rightly seeks to give the protection of the law to the young, the innocent, the unwilling, and the incompetent. However, while adultery, fornication, homosexual acts, and certain deviate sexual practices among competent and consenting adults may violate Judeo-Christian standards of moral conduct, we think that the Penal Law is not the instrument for the control of such practices when privately engaged in, where only adults are involved, and where there is no coercion. We favor repeal of those statutes that make such practices among competent and consenting

adults criminal acts.

Statement, on Private Sexual Morality, adopted by the Council of the Episcopal Diocese of New York, March 18, 1971. Similarly, in the Hardwick case, five religious organizations filed an amicus brief with the United States Supreme Court urging the Court to declare the Georgia sodomy law unconstitutional. Statements from these and an additional ten major religious organizations registering objections to sodomy laws are attached.

5. THE "DEVIATE SEXUAL CONDUCT" LAW DOES NOT PROTECT, AND INDEED UNDERMINES, THE PUBLIC HEALTH.

The deviate sexual conduct law undermines the public health because it deters individuals from coming forward for medical treatments, including testing for sexually transmitted diseases and HIV disease.

Furthermore, concerns that individuals who engage in deviate sexual conduct are themselves mentally ill and in need of treatment are scientifically discredited. Since 1973, the American Psychiatric Association has not listed homosexuality as a mental defect. The APA adopted the following resolution in 1973:

> Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons. Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private.

See Marmor, "Homosexuality and the Issue of Mental Illness," in Homosexual Behavior: A Modern Reappraisal 393 (Marmor ed. 1980) (emphasis supplied).

And as long ago as 1969, a task force of the National Institute of Mental Health recommended repeal of sodomy laws to help alleviate discrimination against homosexuals and the resulting harm it causes the mental health of affected individuals. The report of the task force states:

> We believe that most professionals working in this area -- on the basis of their collective research and clinical experience and the present overall knowledge on the subject -- are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency.

National Institute of Mental Health, Final Report of the Task Force on Homosexuality, October 10, 1969.

6. POLICE FUNDS ARE BETTER SPENT ON OTHER ISSUES.

Law enforcement dollars are better spent on real crimes, not on the questionable surveillance which would culminate in a deviate sexual conduct arrest.

As the American Law Institute wrote in amending the Model Penal Code more than 35 years ago, "Funds and personnel for police work are limited, and it would appear to be poor policy to use them to any extent in this area when large number of atrocious crimes remain unsolved." The ABA expressed similar sentiments in adopting its 1972 position for repeal of sodomy statutes: "Enforcement of laws relating to private, consenting, non-commercial sexual conduct between adults requires an expenditure of enforcement manpower that could better be used to protect public safety and necessitates police practices that are often reprehensible or unsavory."

7. EVEN IF RARELY ENFORCED, THE MERE EXISTENCE OF THE DEVIATE SEXUAL CONDUCT STATUTE ENCOURAGES DISCRIMINATION, STIGMA, AND BLACKMAIL.

Because the deviate sexual conduct law is rarely, if ever, enforced, its maintenance as a criminal statute fulfills the sole function of creating opportunities for blackmail, stigma, and discrimination. In the words of the drafters of the 1955 revision to the Model Penal Code were instructive: "As in the case of illicit heterosexual relations, existing law is substantially unenforced, and there is no prospect of real enforcement except against cases of violence, corruption of minors, and public solicitation. Statutes that go beyond that permit capricious selection of a very few cases for prosecution and serve primarily the interest of blackmailers."

8. THE PERPETUATION OF THE DEVIATE SEXUAL CONDUCT LAW INVITES VIOLENCE AGAINST LESBIANS AND GAY MEN.

Because Montana's deviate sexual conduct law applies only to acts committed between persons of the same gender, it specifically stigmatizes lesbians and gay men, marking them as criminals in the eyes of the law. Accordingly, it serves as a basis for violent attacks against gay people. In enacting the Hate Crimes Statistics Act in 1990, Pub. L. 101-275, the United States Congress ordered the Justice Department to collect statistics about anti-gay violence; in so doing, Congress expressed its concern with this type of violent activity.

Statistics show that anti-gay violence is rising steadily. According to the National Gay and Lesbian Task Force, "Compared to 1989, reported anti-gay incidents increased in 1990 by 11% in Chicago, 20% in Los Angeles, 29% in San Francisco, 65% in New York City, 75% in the Boston area and 133% in Minneapolis/St. Paul. Taken together, anti-gay episodes in all six cities increased 42%." NGLTF Policy Institute, Anti-Gay/Lesbian Violence, Victimization & Defamation in 1990 1 (1991).

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TESTIMONY OF BILL SUMMERS
PRESIDENT, OUT IN MONTANA, INC.
BEFORE THE SENATE JUDICIARY COMMITTEE
THURSDAY, MARCH 28, 1991

Mr. Chairman, gentlemen of the Committee: My name is Bill Summers. I am president of **Out in Montana**, the statewide gay and lesbian advocacy and support organization. I am here in support of the proposed amendment to H.B. 451 before your Committee repealing Montana's "sexual deviancy" law. **Out in Montana** currently is working under a contract with the Montana Department of Health and Environmental Sciences to provide Montana's gay and bisexual population with life-saving information about a deadly disease: AIDS. Montana's law frustrates this already difficult task. Representative Thomas Lee's amendment to the original bill sought to solve the public health question. I can assure the Committee that it does not. To be effective in our outreach program it is vital that we gay and lesbian volunteers identify ourselves publicly in order to reach our peers. I am not protected by Representative Lee's amendment, nor our other gay and lesbian volunteer health workers protected. Representative Lee's amendment does not protect people identified as sexual partners of those who come forward for HIV testing. The realities of public health are simply too complex to be solved by simple exclusions such as the one presented by Representative Lee.

Let me share with you an actual experience that will illustrate the sort of problems we encounter in the face of the "sexual deviancy" law. The most current and reliable statistics reveal that over 20% of male prison inmates have been anally penetrated at least once during hte course of their incarceration, regardless of their sexual orientation. Without the protectino of a condom, this activity is considered an extremely high risk factor for the transmision of HIV, the virus that causes AIDS. **Out in Montana** last year urged the Montana Department of Institutions to provide condoms to men in prison. This is common practice in many other states. Officials in the Department of Institutions, however, told us that they cannot provide condoms to prisoners because sexual activity between people of the same gender is a crime. According to them, providing condoms to prisoners is to encourage felonious behavior. This application of the "sexual deviancy" statute

is particularly odious since officials who use it opt to risk the spread of the virus rather than acknowledge the realities of sexual behavior and help people with the process of behavior change. The irony here is a cruel one indeed. And an expensive one. Treating someone with AIDS costs between $20,000 and $60,000 a year, depending on the available outpatient services. Pre-AIDS treatment now costs at least $5,500 a year. It is, of course, the Montana taxpayer who will pay the cost of treating HIV infection in the prison.

Because **Out in Montana** has dedicated so much time and effort in the war against AIDS, we cannot help but see the repeal of the "sexual deviancy" law as a health issue. But, of course, there are other equally compelling reasons for repeal as well. While Representative Lee's amendment may reflect his own personal religious beliefs, Montana's Constitution guarantees the separation of church and state. Montana's Constitution also protects its citizens' right to privacy. I am here to remind you that Montana's "sexual deviancy" law is this state's stamp of approval on individual people's homophobia, in much the same way that Jim Crow laws institutionalized racism and the segregation of black people in the South.

On April 23, 1990, President Bush signed into law the Hate Crime Statistics Act requiring the Attorney General of the United States to collect as much information as possible on crimes motivated by religion, race, ethnicity, or sexual orientation. when he signed the law, the President said that, "Enacting this law . . . helps move us toward our dream - - a society blind to prejudince, a society open to all." In Montana, however, victims of homophobic attacks fear reporting those attacks to the authorities, for to do so would mean having to identify themselves as felons and as "sexual deviants." The "sexual deviancy" law affects a significant number of Montanans. According to the Kinsey statistics "at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age." Kinsey also tells us that, "whether the [sexual] histories were taken in one large city or another, whether they were taken in large cities, in small towns or in rural areas, whether they came from one college or from another, a church school or a state university or some private institution, whether they came from one part of the country or from another, the incidence date on the homosexual have been more or less the same. In other words, according to

Kinsey, 148,676 Montana men are guilty of a felony. As the statistics are similar for women, we can safely assume that a significant number of Montana women must also be considered guilty of "sexual deviancy."

This law, even as amended by Representative Lee, conflicts with the goals of a sound public health policy, is unconstitutional, and promotes hatred and violence. **Out in Montana** urges you to support the repeal of the "sexual deviancy" statute. Thank you.

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Linda Gryczan
PO Box 124
Clancy, MT 59634

3/28/1991

Mr. Chairman and members of the committee I am Linda Gryczan from the Montana Lesbian Coalition. I am asking you today to overturn the Lee amendments and support HB451 as it was originally written.

It is no accident in this state of individualists that our Montana Constitution has such a strong right to privacy. Montana citizens value our individual rights to privacy. Twenty years ago, Montana lawmakers decided that the privacy rights in our new constitution should not extend to all citizens. The legislature at that time enacted the so-called deviant sexual conduct law. A law that makes felons out of otherwise law abiding people, simply for who we love

I am not asking for your approval or endorsement of my life, for it should make no difference on how you vote on this bill. I am not asking if your religion condones homosexuality, for it should not affect how you vote on this bill.

What I am asking is that you defend the Montana Constitution and vote to overturn the deviant sexual conduct law. I am asking that you extend the rights provided by the Montana Constitution to <u>all</u> of us.

MISSOULA
301 W. ALDER
MISSOULA, MONTANA 59802
(406) 721-5700

Ex. 12
3-28-91
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March 18, 1991

Senator Richard Pinsoneault, Chairman
Senate Judiciary Committee
Capitol
Helena, MT 59620

Dear Senator Pinsoneault,

I am writing regarding HB 451, an act to generally revise the laws relating to sexual crimes.

The original bill proposed to decriminalize sexual relations between same-sex, consenting adults. This measure was killed in the House in spite of testimony to its importance in controlling the spread of AIDS. Language providing immunity from prosecution to those seeking AIDS testing and treatment was substituted.

As a local health officer in Montana, I am responsible for controlling communicable diseases including AIDS. Having worked extensively with people at risk for AIDS, I believe that Montana's sexual deviance code *does* create an unnecessary barrier to controlling this epidemic. Language introduced in the House does not fully address this concern.

Providing immunity for individuals seeking testing does not extend protection to other actions commonly involved in fighting AIDS. For example, persons named as contacts of an infected individual and homosexual men involved in AIDS prevention programs are not protected by the House provision.

The truth is, no immunity provision can reach far enough to remove the stigma and fear created when an entire class of citizens is legally discriminated against. As long as this law is on the books, it will serve only to prevent those most at risk for contracting and spreading AIDS from coming forward. For these reasons I urge you to reinstate language which decriminalizes same-sex sexual relations between consenting adults.

Sincerely,

Ellen Leahy
Health Officer

cc Senator Mike Halligan

Ex. 13
3-28-91
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MISSOULIAN EDITORIAL 3/7/91

Prudish law doesn't work

State hasn't the means or any business policing bedrooms

The Montana House of Representatives has decided one of the great non-issues of our time: An archaic law prohibiting homosexual sex will remain on the books.

It is something less than a great moral victory.

Health advocates had sought a change in the law in hopes of removing fear of criminal prosecution as a reason deterring homosexuals from being tested for exposure to the AIDS virus, or from ensuring that partners of people who test positive for the AIDS virus are informed of their exposure. Only through efforts to make people aware of their potential to spread the disease can health officials hope to bring the AIDS epidemic under control.

That apparently isn't reason enough to alter a throwback law that presumes the sexual activities of consenting adults are the government's business.

The need to do all that is reasonable to prevent the spread of AIDS is reason enough to change the law. While AIDS testing and counseling are conducted under procedures that assure confidentiality, it's not unreasonable to suspect that some gays may forgo testing in the belief the law against homosexuality could put them in legal jeopardy.

But there's a simpler and far better reason why the law should be stricken: It isn't enforced and is, in fact, virtually unenforceable. The law does no good.

The mind boggles at the thought of the lengths our constabulary would have to go — the depths to which it would have to stoop — to ensure Montanans weren't sleeping with Montanans with similar chromosomes. The fact is our criminal justice system has its plate full enough with activities that actually protect and serve the public.

Life would be no worse, and our code books a lot thinner, if the Legislature would divest itself of laws that can't be enforced.

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Ex. 14
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State Senate Judiciary Committee
Capital Building
Helena, Montana 59601
PHONE: (406)444-4800
FAX (406)444-4105

REGARDING: House Bill 451

MESSAGE: Vote to keep the Lee Amendment to House Bill 451.

SIGNED BY THE FOLLOWING INDIVIDUALS

Martin Jones	2130 Pleasant Rd	KALISPELL	755-2178
Lee B. Lee	614 2nd Ave E.	KALISPELL	752-6101
Don Ewalt	975 Swan River Rd	Big Fork	837-6713
Jim Waltz	475 ROOTJACK LK RD	WHITEFISH	862-1250
David K. Thomas	400 Liberty	Kalispell Mt.	752-5467
Steve Berry	305 Lakeridge dr	Somers MT	857-3326
Tom Ellis	966 BIRCH GROVE	KALISPELL	756-5851
Joe Boles	POB 151	Kalispell	755-1368
Mary Fitz	139 DOGWOOD Ln	KALISPELL	N.A.
Phillip Smith	2am Hays Lake RD	Kalispell MT	N.A
Ronald E. Williams	632 E. Evergreen Dr	Kalispell MT	752-5887
Hugh Galt	Box 85n Kalispell Mt	Kalispell Mt	756-7241
Kirk Tobey	540 8TH Ave E	Kalispell MT	752-2474
Michael Cummings	130 ARCHWAY RD	Lakeside, Mt.	844-3320
Tony Williams	1003 FOX LAKE RD.	KALISPELL MT	755 3870

The Homosexual Agenda: Changing Your Community and Nation

by Brad Hayton

Homosexuals are attempting to force their lifestyle and its consequences upon society. Although they enjoy the rights of all American citizens under the Constitution, they want special rights that have been given to people who have unchangeable qualities: those of various races and handicaps. Though the homosexual lifestyle is a freely chosen behavior, these groups want social acceptance and privilege. They are attempting to accomplish these ends through "gay rights" and "anti-AIDS discrimination" legislation at all levels of government: local, county, state, and national. They desire to teach homosexuality as an "alternative lifestyle" in public schools, and want their immoral relationships both recognized and subsidized with government funding by means of "domestic partnership" laws that redefine the nature of the family.

Christians believe they have been called to promote morality in society, rather than immorality. Christians are called to be healing agents of the homosexual community, calling homosexuals to repentance and trust in the saving power of the Lord Jesus Christ. Christians must also minister to the needs of homosexuals as they suffer from the consequences of their sin, whether they take the form of medical, emotional, or spiritual suffering. And most Christians believe that they should work against types of legislation that would both endorse and promote the homosexual lifestyle, in order fulfill Christ's command to be salt in society. Such homosexual rights legislation not only promotes immorality in society, but spreads the many diseases that result from the practices of homosexuals. Promiscuity and sodomy have been blamed for the worst epidemic in the twentieth century: AIDS.

What You Can Do!

You can make a difference regarding the influence that homosexuals have in your community, county, and country. You can make a difference in public policy. You don't have to be a George Washington, Abraham Lincoln, or even Ronald Reagan. The place to begin is right in your own home, church, and community.

At Home

Getting Informed

Getting informed is the first, and perhaps the most important, step in political action. Being informed about impending legislation, the issues sur-

rounding the legislation, who to contact and when are key to political action. Also if you are to be effective salt, you must be informed about what is happening in your own community.

At the local level, you should ask some of the following questions. Who are the homosexual groups in your community? What kind of literature are they publishing and distributing under their own name and under the name of others? What is this literature saying? What kind of legislation are they working towards? Who are your local homosexual politicians? What is their influence? What is being taught to your children in their local sex education classes about the lifestyle of homosexuals and its effects? When and where are local "gay rights" parades and celebrations being held? Who are sponsoring these groups? Who is funding these groups and their activities? Private organizations or public tax monies?

Applying these same questions to the county, state and federal levels will also give you much information about homosexual activism. This information will stimulate you to get more active yourself in countering these homosexual special interest groups.

There are many sources of information readily available to you. Radio and television, especially PBS stations and news broadcasting, keep up on local as well as some federal issues in a general way. Local newspapers as well as national newspapers are a valuable source of information on pending or controversial legislation. Magazines can keep you up on national events. Newsletters, especially those regarding your specific issues, are a quick and efficient means of communication. And, of course, books will help you decide upon what you believe about certain issues, giving you argumentation and Scriptural understanding.

Locally, use the telephone book and call for information about any organization that appears to be homosexual-oriented. Ask for copies of all their literature, as well as a statement about their funding sources. For example, you might find an organization that publishes AIDS education materials for your local junior high school has the same telephone number and address as a local homosexual activist group. Many homosexual activist groups are also funded through your tax monies. For example, one group funded by Los Angeles County actually finds foster teens 13-17 and places them with homosexual couples of the same sex.

Ask your local politicians about homosexual groups in the community. Ask your local schools about the content of their sex education program, especially their teachings on contraceptives, "safe sex," and abstinence. Ask your children, or the children in your church, about what is being taught in their sex education classes at school.

The millions of Christians in America *can* make quite a difference in the legislation of this country if they are informed of the issues and active in making political decisions. You do make a difference!

Writing Letters

Writing letters is an easy way to express your viewpoint to many of the decision-makers in this country. They take little time. And yet you can influence politicians at all levels of government, ranging from the President of the United States to your local city councilman or school board member. All are greatly influenced by public opinion since they are elected to office. That is surely one of the great features of the American democratic system. Our elected officials are responsible to us -- those who elected them to office.

In many cases, a letter expressing a given viewpoint can change a legislator's mind. A letter is particularly helpful when a representative is wavering on an issue or is received at key times during the legislation's process through subcommittees and committees, the House or Senate, as discussed above. Send a copy of your letter, or another copy, to the Chairman of the committee to which it was referred.

Your representatives view each letter they receive about an issue as representing the opinions of many people who do not write. A number of letters on the same topic may prompt the assignment of a staff member to draft a position-paper for a congressman or local official. In any case, the pros and cons received by mail or phone are counted and the Administrative Assistant regularly reports on the mail received.

Don't be discouraged, however, if the representative's vote still is unfavorable to your own position even after your letter. Other people are writing too, and next time the vote may go your way. Nevertheless, your representative and his or her staff have registered and listened to your opinion. You *are* having an influence.

It is important, though, that your message be presented as effectively as possible.

Writing Mailgrams and Telegrams

Sending mailgrams and telegrams are extensions of the letter writing technique, but are used when speed and/or instant visibility in your representative's office is essential. When a congressional bill is to be on the floor or presented before a committee that day or the next, an appropriate timed mailgram or telegram could sway your representative.

A mailgram is a telegram delivered the day after it is sent, whereas a telegram is delivered the same day. For the same cost the mailgram delivers about ten times as many words as the telegram. Though lengthy exposition is sacrificed at the expense of speed, the general guidelines of letter writing remain the same. Use your own words, be courteous, factual, helpful, and abstain from threats or demands.

Sending Post Cards

Although post cards combine the worst aspects of letter writing (delay in delivery and response) and telegrams (excessive brevity), they can be used with effectiveness when the message is brief and the need for numbers is great. Either at some kind of group gathering or visiting friends, relatives and acquaintances, have people write a message and address the card while you wait, and then hand it back for mailing. Don't use post cards with preprinted messages, however. They are a waste of money and time, since after the first few cards of that variety reach the members' offices, they are ignored.

Meeting a Representative to Make Your Case

Meeting a government representative is the most effective way to solicit support for or against a project, program or bill. The process of meeting a member of Congress and a local representative is very much the same, though there are a few differences The following will specifically address meeting with a congressional member.

Since not all congress people know all the issues, meeting with their Legislative Assistant (LA) who might have greater expertise in a specific issue is often equally as effective as talking to the member. Although it is often possible to meet with the member and/or his LA in his Washington office, you should expect to meet with only the member when he is back home in his district office.

Your local representatives are probably even more influenced by community opinion than your congressional representatives since they have a much smaller constituent base. Thus, your meeting will have even a great impact upon his or her future policies. Your mayor, city councilperson, and even your school board representative are extremely influenced by public opinion. But they must hear your opinion! Visiting them is one of the most effective means for your voice to be heard.

Telephone Calls

Telephone calls to your representatives have the advantages of being swift and to the point. However, the key to a successful use of calls is talking to the right person. Unless you are personally known to the Senator, Congressman or other representative, or unless you contributed to his or her election campaign, you probably will not get to talk to him or her personally. It is better to utilize the phone call *after* you have become known to the member and his or her office staff.

When phoning a congressional representative, identify yourself as a resident of the State or the Congressman's district and then ask to speak to the Legislative Assistant (LA) who is handling the issue that concerns you. You can simply identify yourself as a voter who is very concerned about the issue and would like the representative to vote a certain way, or you may present some valid arguments concerning your issue to the LA. It if often not necessary to call your member's Washington office, since if you get your message to his Administrative Assistant at his home office, he will get the message to Washington through his WATS line to your representative.

Though many times your local representatives are not as equipped to handle a great amount of phone calls, they are also effective in communicating your opinions. Like letter-writing, timing is very important. Call just before a vote will be made on a "gay rights" ordinance or an anti-AIDS discrimination ordinance, or a decision about a homosexual parade or demonstration. Your calls will actually *help* your representative to better know the feelings of his or her constituency and community, and will be much appreciated.

Letters to the Editor

Writing letters to the editor of your local newspaper is an effective way to make your views known to the public. It is actually free publicity! Your letters can sway others to action. You may write your letter to:

1. Express your agreement or disagreement about a paper's recent editorial.
2. Express your reaction to an event recently covered in the paper.
3. Express your approval or disapproval of the way the paper is presenting the news, either accurate or sloppy, fair or biased.
4. Express your views on a community, state, or national problem like abortion, pornography, private education, national defense, etc.
5. Express your solutions to various community or national problems.
6. Express your judgment on the performance of elected officials.

Joining Local Groups or Forming Your Own

Working on an issue alone is sometimes a lonely business, and can easily become discouraging since results are not always immediate. You need support to keep you going. To do this, either find an already existing group in your church with these same interests or find other members of you church body who would like to start getting involved politically. Although for the most part there are relatively little political overtones in most types of social action, be sure to clarify that your political involvement focuses on Christians as individuals, rather than on churches as political action groups. You are trying to activate Christians as citizens in the political process by getting them to exercise their right to vote, contacting decision-makers, and conducting study groups on the homosexual rights issue.

Get together with a handful of people who believe as you do and want to work on this issue. You will probably want to name your group. If you have centered your group around this specific cause, then identify your cause within the name. Call your group "Citizens for Traditional Values" or "Citizens for a Sound AIDS Policy," or maybe even names like "Citizens for Heterosexual Rights," "Citizens for Health" or "Christians for Moral America." The name should also identify the scope of your activities, whether you are a national group, a chapter of a state or national group, or a state or local group. For example, "Southern Californians for Traditional Values."

If you intend to receive or spend money, you may want to incorporate. Check with an attorney about the corporation laws in your state. If your activities include lobbying your state legislature, your group will probably have to file with a state ethics commission. If your group decides to give money to candidates for federal offices, it will have to register with the Federal Elections Commission as a political action committee. Nevertheless, if you only wish to do grass roots lobbying, as described below, these actions are not necessary.

Here's some suggestions for getting your group organized and moving.

1. Choose a project. Be specific and start small. Decide on both short-range and long-range goals. As a short-range goal you might want to win your congressman's vote on a particular bill. As a long-range goal, you might want to establish methods of keeping your congregation informed about the legislation pending regarding this issue (starting a newsletter, speaker's bureau, church bulletin, etc.) or even a goal to get every member of your congregation to be registered to vote.

2. Get educated to act. Read some of the books or other publications on the homosexual rights issue. Subscribe to a newsletter regarding this issue. Get in contact with a local, state or national organization that deals with homosexual rights and the homosexual agenda concerning the current legislation issues and people to contact. Find out how the problem is being expressed in your community.

As discussed above, locate your local homosexual activist groups, and find out what they are doing. Compare statistics of homosexual rapes, child molestation, and homicides to statistics of the heterosexual population. Locate the local homosexual bars, bath houses, and other hangouts, as well as businesses that cater to the homosexual population.

3. Start acting. There is a time for talking, but there is also a time for acting. Some groups may be willing to make a commitment for a year while other groups or members may want to try out the first project before they make further commitments. Be flexible and see what works for you. As you grow, find people who can help, motivate them, and give them responsibility. Divide your tasks up into various action groups for the purposes of research, building coalitions with other groups, recruiting more members, and publicity.

4. Evaluate your progress. Look for changes in the project you've undertaken, compare them with your original goals, and decide whether to reevaluate your methods. Ask yourself, "Are we getting the results we desired?" "How many members have we recruited for our organization, or gotten involved behind our issue?" "Has our representative responded to our letters, and what did he say?" "How are we coordinating our actions

with other local action groups concerning the same issue?"

Remember, however, that although you may not have changed anyone's opinion in government or your project may not have had any identifiable success in your community, you have been influencing the members of your group, getting them involved with changing their worlds and their lives. And you are attempting to communicate that message in the most effective way you can. Keep it up!

At Church

While churches cannot officially be involved in politics, individual church members can be involved as Christian citizens. While this is an important distinction, it is not designed to limit your political involvement. You should share your thoughts on Christian political action and interest in public affairs with your pastor. He might put you in contact with other interested politically involved Christians in your community, or might simply not want to get involved himself. He might have many legitimate concerns, including: Is this activity consistent with my calling as a pastor? Will it divide my time or split my church? Is it legal? Although pastors have certain legal restrictions regarding candidate endorsement, fund raising, the use of their church mailing lists, and official church lobbying, these restrictions do not apply to individuals within the church.

There are many activities that a pastor or church leader can do in the church setting. Here are just a few ideas.

Host a luncheon in your church on a weekday and invite local pastors to discuss the homosexual rights and AIDS issues. Pick out a specific issue for each luncheon. Or line up a speaker who is familiar with the issues currently before the House, Senate, State legislatures, or before the County supervisors or City Council.

Show a film documenting the homosexual lifestyle, organization, and influence upon American society, or a film that accurately describes the nature, effects, and treatment of AIDS, along with a Christian approach to helping those with the disease. This can be done in your church or local school auditorium or hall. Invite other local churches to help sponsor the film. There are several good documentary films available on these issues. Follow up the presentation with discussion and a plan of action if appropriate.

Help your pastor develop a series of Sunday School or Bible study lessons around many of the family issues that include promiscuity and homosexuality. Get your pastor the necessary resources like books, articles, Biblical studies, etc. to facilitate his studies. Pastors many times do not have the time to search out these materials, especially if they are not readily available in your local Christian book store.

Host a public policy study group in your home in order to discuss many of the issues mentioned above from a Christian perspective. Invite your pastor to moderate the discussion.

Set aside a special Sunday in your church to recognize and pray for your local elected officials. You can even plan a reception after the service so that the congregation can get to know their elected representatives.

You, as a church leader, can become a public policy liaison keeping your pastor and church updated on current issues, policies, and bills that are related to the biblical and moral positions of the church as well as their legal status. This might be merely keeping your pastor updated on current legislation, or even putting in the church bulletin current relevant information. You might get the pastor's permission to visit the adult Sunday school classes on occasion and bring them up to date on what is happening in Washington, your state legislature, or local community.

Be sure to keep yourself well-informed, certain about the facts, and not exaggerating the situation. Clearly explain the problem, describe its implications, and lay out a plan of action to correct the problem. Most members in the congregation don't have the time, or maybe even the interest, in doing the research for themselves. You, as the public policy liaison, can have a special ministry to their needs.

You can set up a literature rack in your church vestibule, keeping the rack well supplied with tracts, monograms, books, and brochures about organizations that deal with social and political issues and legislative matters. Most organizations have a special bulk price for their publications. You might finance this activity with a small "donation" box next to the rack.

You might also wish to start a newsletter in order to inform your congregation of current biblical and moral issues, policies, and bills that are related to the church. A newsletter must conform with the above rules about church involvement in political

and legislative issues. A monthly newsletter can be a great way to keep your congregation not only informed, but active in changing their world around them. It can also inform them what other Christians are doing in these areas, review books and articles of particular importance, and generally support and motivate them in their activities.

As a church leader, you can start a phone or letter tree to quickly notify members of pending legislation pertaining to biblical and moral issues. Again, as an official of the church, this must conform to some restrictions, but these restrictions do not apply to actions as a private citizen.

You might also organize a prayer chain in your church. Prayer is a mighty force in affecting both public policy and our elected officials. 1 Timothy 2:1-2 says, "I exhort therefore, that, first of all, supplications, prayers, intercessions, and giving of thanks be made for all men; for kings, and for all that are in authority; that we may lead a quiet and peaceable life in all godliness and honesty." Contact your church prayer group, the ladies' missionary society, youth group or other group interested in elected officials or government to recruit intercessors. It is also a good idea to have each member of your prayer chain to send a letter to their official once during the year, telling them that they are praying on their behalf.

In Your Community

Start An Initiative

Many Christians who are concerned about the homosexual agenda find that local city councils are enacting legislation without voter approval. Concerned citizens suspect that the vast majority of the community does not want this type of legislation, but they haven't been given the chance to vocalize their opinion through the voting process.

Consequently, many groups have formed to start initiatives in order to put the homosexual agenda legislation before the community for a vote. An initiative is a procedure enabling voters to propose a law and pass it by themselves. Many states, counties, and cities already give their citizens this right. Several also permit constitutional amendments to be proposed in the same way, though more citizen support is usually required for amendments. If your state, county, or city has not enacted the initiative process, get lobbying. You are missing out on this important safeguard for citizen rights.

The initiative is a powerful tool when citizens are confronted with an unresponsive legislature, since it enables them to go over their heads and directly appeal to popular support. Initiatives should not be attempted, however, unless all other ordinary legislative channels have failed. They are difficult to organize successfully since just getting them on the ballot requires petitions from 6-10 percent of those who voted in the last election. Some states require that a certain percentage of the signatures collected must be in a specified number of counties or congressional districts.

There are two conditions required for success. Either the proposition must be so popular that people flock to support it, or a citizen's group must be extremely well organized to publicize the issue and capture the necessary support.

In either case, several steps must be taken to insure the initiative's success. First, make yourself completely familiar with the state law governing the initiative process. The technicalities of election law are often treated as sacred. Even the smallest wording of the petition or the method of collection may invalidate your petition. Pay special attention to the requirements about who can circulate, who can sign, and how they have to signed. Contact your secretary of state and also a lawyer familiar with petition procedures in your state. Contact the appropriate officials if your initiative is at the county or city level.

Second, the law which your group is seeking to have adopted must be very carefully drafted. Phrasing must be as clear and concrete as possible to avoid confusing the average voter. Law professors and constitutional lawyers can be a great help in this regard. Other similar state statutes may provide some useful models.

Third, your group must devise a sound campaign strategy. You must determine how the measure will be presented to the public, what other groups will join forces with you to cosponsor it, and who will aid you in the areas where support for the measure is weak. Most of the time the law specifies a time period during which signatures must be collected.

As always, media coverage is the key element of your success. Organize press conferences in the state capitol and the state's largest cities. Get appearances on radio and TV talk shows and make speeches before community groups. Use every method applicable described in this political activism section. Canvass large social and sport events, shopping centers, apartment complexes, etc. Don't stop, however, when you obtain the requisite number of signatures. Special interest groups against the initiative will most likely go to

court seeking to invalidate as many signatures as possible on technicalities. So get all the signatures you can in the allotted time period so that you have a cushion. And since petition gathering is also an educational experience for the public, you are informing potential supporters of the coming election.

Last, if your initiative has won a place on the ballot, employ all the methods of a good political campaign to obtain success in the election. Seek both editorial support from the media and present candidate support, though not letting it become a partisan issue. Hopefully, your initiative will be enacted into law.

Monitor the Media

The humanistic, anti-Christian, and even immoral biases of the media have increasingly become a great concern of the Christian community. They have almost consistently supported the homosexual agenda during the past fifteen years. They have reported homosexuals as poor and destitute, a discriminated minority who cannot get into the mainstream of society, even though most homosexuals are middle class and in society's mainstream. The media has disinformed the American populace about AIDS and the immoral lifestyles that spread the disease. And they almost consistently worked against the most sane methods for containing the disease.

Although many times you might feel powerless in changing this state of affairs, there are many positive actions that you can take that will make changes.

You can complain to the FCC. Whatever the wisdom of creating the FCC in the first place, you can use it to keep programming "balanced." For example, complain to the FCC about unfairness in broadcast news. Many times a program will consistently present pro-homosexual groups in a positive light and pro-family groups in the negative. Some will present only one side of the research on AIDS without adequately presenting the other side. Remember licenses can be revoked if the offenses are grievous! Write to the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554 or call (202) 655-4000.

If you discover a significant factual error in a news report, let Accuracy in Media (AIM) know. It monitors news reporting practices and launches embarrassing lawsuits on occasion to keep networks, magazines, and journals honest. AIM also corrects the record by publishing the names of offending reporters, accompanied by an account of the story as it really happened. Write AIM, 1341 G Street, N.W., Suite 312, Wasbington, D.C. 20005. In this regard, you might also write some of the other appropriate media monitoring agencies listed in this publication. Some of these organization will initiate political activism against these stations or programs.

A timely letter to the editor of the offending publication can sometimes do wonders. Note how to write a letter to the editor above. Not only will such a published letter bring your viewpoint to the public's attention, it will sometimes change publishing policy. One woman wrote to the editor of her local newspaper which published an ad displaying a nude woman, complaining of its offensive nature. When the ad appeared the next week, the same woman was used in the ad, but this time clothed. Your opinions have importance! Organize and motivate your political activism group to write when the need arises.

When you find obvious biases write or call the networks. Direct your calls and letters to specific individuals for a greater effect. Also let your local station know of your displeasure, since the networks depend on local outlets. Enough complaints from the affiliates of the networks will have a definite effect on network policy. Listed below are the addresses, telephone numbers and names of the chief staff members of the three major networks. Write AIM for their addresses.

Since stations are obliged to give air time to responsible individuals who disagree with editorials broadcast by the station, contact your local TV or radio stations in person or by phone or letter. Do this even if you object to a network program, since the networks try to keep their affiliates happy. When you aren't happy, neither are their affiliates.

Write the sponsors of shows you believe are biased or inaccurate. Commercial advertisers attempt to always stay clear of political controversy, and if they believe that they are losing buyers because they are sponsoring a program, they will back away quickly. The network may even reconsider the program contents. When writing the letter, be courteous but firm, saying that you will not buy their product so long as it sponsors the show. Make sure that these are not form letters since letters of complaint are especially effective if done spontaneously. Use your own words, but also motivate others to write.

We often forget that the most effective way to sway the media is by our subscription. When a newspaper or magazine continually offends you, drop the subscription. When a TV news network is continually biased in a direction that you disapprove, don't watch it. When a program is offensive either politically or morally, turn it off. Don't attend movies at a theater until you know its moral or political character. Don't patronize the movies that offend you in some way.

You'll be surprised how effective this is. Why do stations show family-oriented programs like the Cosby Show, Little House of the Prairie, The Waltons, etc.? Because people watch them. The same is true for immoral soaps and biased, inaccurate reporting. Movies that promote immoral sexual behavior abound because people, including Christians, consistently watch them.

When in doubt, turn it off. Monitor your own use of media. I know of one man who did this. Night after night he sat complaining about an offensive TV program that was very politically biased. "Why doesn't somebody do something about it!," he would say. Finally, he got so upset that he turned it off. To his surprise, three weeks later the program was cancelled due to low ratings. Evidently, others had the same feelings about the program and *took the same action*.

Conclusion

These are just some of the actions that you can take to educate and activate your friends, neighbors, church, and community about the homosexual agenda. God has commanded us to be a salt and light to this world. We should not let our salt lose its savor through lack of use, nor hide our light under bushels. Rather, God has given us both the right and power to be effective changers of our culture, especially in our democratic United States.

You can get involved at home, at church, and in your community to change our culture. Local groups are forming around the nation to fight the teaching of homosexuality as an "alternative lifestyle," and they are doing it effectively. It was concerned citizens who banded together to overturn San Francisco's domestic partnership legislation, by starting an initiative and giving the local voters a chance to express their opinions about this controversial legislation.

Many communities around the country have overturned "gay rights" legislation. TV networks have not shown pro-homosexual programs, as a result of subscriber pressure. Many community members have become aware of the homosexual threat to the traditional family and about the actual behaviors of homosexuals through concerned Christians who desire to educate themselves, their church, and their community.

You can make a difference!

Exhibit # 15
HB 451 3/28/91

The Homosexual Agenda: Issues and Arguments

by Brad Hayton

Many times it is difficult to write a letter to your representative or speak up at a city council meeting because you feel that you don't know what to say. You know that homosexuality is wrong, and you believe it is wrong because the Bible says so. "Because the Bible says so" is the bottom-line argument for the Christian.

And yet using the Bible does not always convince your representative, city councilman, or friend of the soundness of your opinion. They probably don't believe in the Bible.

You need other arguments for your beliefs -- arguments that they are more likely to hear and accept. They will give you a common ground upon which you can stimulate a lively discussion. Although many might not have some of the same morals as you, most value health. Most also value money, and when you show how much something will cost them, they tend to listen. Most believe that Americans have certain basic human rights. Most are against violence and coercion, and accept some of the ten commandments as basic morals: don't steal, murder, cheat, lie, harm others, etc. And most appreciate the logic of an argument. Although logic many times does not motivate people the way emotions can, logic can give them a clear understanding of the issues involved and become the basis for sound public policy.

This essay outlines some arguments that you can make in fighting the homosexual agenda. You can use these arguments in writing to your representatives, making a case before your city council, writing a letter to the editor of your local newspaper, speaking before your local group, or even discussing the issues with your neighbor.

Homosexuals have used many strategies in their attempt to change the minds and behavior of the American culture. Although their primary goal is for total acceptance of the homosexual lifestyle, they attempt to accomplish this goal through many means. Below we have only touched upon a few of their means, and have outlined some arguments to counter them. The homosexual strategies surveyed here are their push for "gay rights" ordinances, the abolition of sodomy laws, the indoctrination of youth with homosexual "alternative lifestyle" education, the redefinition of the family as a "domestic partnership," "Gay Pride" demonstrations and parades, and AIDS anti-discrimination laws.

...RIGHTS ORDINANCES

Purpose of Ordinances

Throughout most of history societies have always socially discriminated against homosexuals. They have disapproved of the unhealthy behavior, child molestation, and sexual practices of homosexuals. Due in part to the West's increasing acceptance of sex as primarily a form of pleasure rather than for reproduction, homosexuality has increasingly become accepted as an "alternative lifestyle."

Though homosexuals have maintained their Constitutional rights as citizens of the United States, they still receive much social ostracism from others. For the most part, Americans still do not accept acts of sodomy as "normal," and psychiatrists still do not believe homosexuality psychologically healthy, though officially the diagnosis has been eliminated.[1]

Thus, homosexuals have taken to the offensive in changing the opinions of American culture. By means of threat and coercion, they bullied the American Psychiatric Association into taking off homosexuality from their list of psychiatric disorders.[2] And by means of "gay rights" ordinances, they hope to categorize themselves with other minorities, so that society will begin to treat them "fairly."

"Gay rights" ordinances have begun to spread city by city across the United States, from California to New York. These ordinances link "sexual preference" and "sexual orientation" along with race, sex, national origin, and religion as grounds for non-discrimination. Homosexual activist groups hope that these ordinances will facilitate increasing social acceptance as they become used to force affirmative action policies in both the public and private sectors of society.[3]

Arguments Against Ordinances

Homosexuals already possess legal rights under current law

Homosexuals have the same legal rights that all individuals currently have under the law. These include the Bill of Rights that encompass such protections as freedom of speech, association, ...courts, and equal p...otec...tion of the law. They can form lobbyist organiza...tions, incorporate, form student organizations, obtain tax deduction status, and publicly assemb...rally, petition, and carry out all forms of political activism in support of their political ideas. Indee...the ACLU has published a book of close to 200 pages detailing the rights of homosexuals under e...isting law.[4]

Homosexual groups have shown no statistics in proof of their supposed discrimination. Though many times socially ostracized, there is no evidenc...of a disparity of incomes, cultural opportunities, o...education.

"Gay rights" laws are of a different nature than other civil rights legislation

Proponents of "gay rights" laws have included themselves as an American "minority" that deserves the same protection as other minorities. However, homosexuals differ from other groups protected by civil rights ordinances in several ways.

First, sodomy is a freely chosen act, whereas race, color, sex, and national origin are not. Religious preference is the only exception. Yet the freedom and protection of religion is clearly a constitutional right. Human rights laws do not protect behavior.

Homosexuals have argued that they are "born that way," and that they cannot alter their acts of sodomy. However, such statements go against substantial scientific evidence to the contrary. There is no convincing evidence that homosexuality is genetic, and much evidence that those motivated to do so can change their behaviors.[5]

Second, sodomy has historically been morally condemned by most of civilization, whereas races, sex, and national origins are morally neutral.[6] It makes no sense to force people to associate with those they consider immoral by their actions.

Third, human rights laws only protect against arbitrary and irrational discrimination. When sex, race, religion, or national origin are used to qualify a person for a job, it is arbitrary and irrational discrimination. Such discrimination has nothing to do with the character of an individual. Since homosexuals engage in behaviors that greatly increase the health risk of others, and model behaviors that most adamantly oppose, people should have the right to discriminate in their hiring practices to protect not only themselves, but their constituency as well. Deviant sexual behavior tells

significantly more about a person's character than does a person's race, color, or national origin.

"Gay rights" laws coerce people to violate their own consciences

Compelling people to hire homosexuals forces them to violate their own religious conscience, let alone moral conscience, that condemns such behavior. The Civil Rights Restoration Act demands that any religious organization that receives federal funding, no matter how small, must not discriminate on the basis on sex, race, religion, or national origin. If "sexual orientation" is added to these groups, then even churches, religious schools, and other religious organizations that receive government funds to help run their day-care centers, soup kitchens, battered women shelters, and other ministries for the poor and homeless will be coerced to hire homosexuals or lose all funding. In fact, some "gay rights" laws will force any private organizations that discriminate in their hiring practices to hire homosexuals, whether they believe the practice is immoral or not. Imagine such a law that would favor prostitutes or those who engage in other such "sexual deviations" as incest or exhibitionism. Though later repealed, a Duluth, Minnesota ordinance appeared to permit a person to come to work "in drag," the clothes of the opposite sex, since an organization could not discriminate against someone's "sexual preference."

"Gay rights" laws take away the legal rights of others

Giving more rights to homosexuals means taking away rights from other groups that do not approve of homosexual behavior. They will restrict a landlord's freedom to not rent to those who engage in what he or she believes is a sexual perversion. They restrict the right of a parent to select who will teach their children's moral values. They force religious organizations to hire those who they consider immoral.[7]

Magnuson outlines some of the implications of a proposed "gay rights" ordinance in Alexandria, Virginia.[8] A convicted child molester, homosexual or heterosexual, could sue a day care center for refusing to hire him since it would be discriminating against his "sexual orientation." A hotel or motel owner could be sued for refusing to rent to couples desiring to fornicate or commit adultery or sodomy. An insurance company could be sued for refusing to extend benefits to HIV positive people or the "spouse" of a homosexual partner. A bank could be sued for refusing to loan money to a movie maker who makes child or homosexual pornography, since it would be discriminating on the basis of "sexual orientation."

In addition, "gay rights" supercede one's "right of association." There are well-known social sanctions on those with flagrantly immoral lifestyles. People dissociate from liars, cheats, and flagrantly unfaithful spouses. Likewise, people have historically dissociated themselves from those who engage in bestiality, incest, necrophilia, transvestism, exhibitionism, voyeurism, and other sexual acts considered perversions. "Gay rights" laws would make such "rights of association" illegal.

"Gay rights" laws endorse the homosexual lifestyle

No previous civilization has ever endorsed the homosexual lifestyle. Each has condemned homosexuality, believing that such behavior would destroy the very foundation of civilization itself: the family. "Gay rights" laws, however, endorse these behaviors, legitimizing acts of sodomy. This goes against the wisdom of all past generations and civilizations. These laws reward the immoral at the expense of the moral. They punish those who are self-disciplined in marriage and child care, and reward those who live for momentary pleasure.

Advocating homosexuality as an "alternative lifestyle" of equal morality and propriety with heterosexual behavior is in actuality a theological and moral statement. It is a relativistic moral scheme that can easily include all "sexual preferences" or "sexual orientations." Yet, this standard is not shared by the world community. Bestiality, incest, exhibitionism, etc., have been considered immoral and perversions of human nature throughout western civilization. As the U.S. Supreme Court recently pointed out, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."

"Gay rights" laws will give special privileges to homosexuals

First, though a heterosexual employee facing a legitimate job-related discipline would have difficulty claiming that such discipline was due to his or her "sexual orientation," a homosexual employee could make this accusation and thereby lessen or completely escape discipline, or charge the employer with discrimination.

Second, homosexuals would also gain special privileges in applying for jobs. They would receive subtle preference over an equally qualified

heterosexual applicant for fear that not hiring the homosexual might lead to a charge of discrimination.

Third, though "gay rights" legislation does not require affirmative action, other similar civil rights legislation has resulted policies that require certain percentages of specific groups. For example, since many homosexual groups claim that ten percent of Americans are homosexual, an employer might be pressured or even required by the state to have ten percent of his employees homosexual. Already, in some cities like Santa Cruz, homosexual civil rights laws have been applied to affirmative action.[9]

"Gay rights" law threaten public health

As described below, homosexuals have many more sexually transmitted diseases (STDs) than heterosexuals. Seventy-eight percent of homosexual men admit to having had a STD.[10] They have exceptionally high rates of gonorrhea, syphilis, Hepatitis A, Hepatitis B, cytomegalovirus, amoebic bowel disease, herpes, and AIDS.[11] To just take two examples: homosexuals are responsible for up to one-half of the nation's cases of syphilis, and from 60-75 percent of AIDS, though the percentage of AIDS cases is decreasing. The public cost for AIDS alone may exceed sixty billion dollars by 1991.

"Gay rights" laws merely protect and promote STDs. After the passage of "gay rights" laws in San Francisco, the city has experienced a sharp increase in the rate of venereal disease (22 times the national average), infectious Hepatitis A (100%), and infectious Hepatitis B (300%).[12] Giving special rights for those who spread STDs significantly more than the rest of the population, merely gives them a license and encouragement to spread more. In the case of AIDS, it is a license to kill. It does not make rational and medical sense to give special legal protection to a behavior that is posing grave health risks and threatening society with the largest epidemic the world has ever known.

Endnotes

1. According to the latest polls of American psychiatrists, there is still widespread opposition to the APA's official position of homosexuals' normalcy. In a survey conducted in 1977, analysis of the first 2,500 responses to a poll of 10,000 psychiatrists found that 69 percent believed that homosexuality usually represented a pathological adaptation. Only 18 percent disagreed with this proposition. Sixty percent of the respondents asserted that homosexual men were less capable of "mature, loving relationships" than their heterosexual counterparts. Finally, 70 percent supported the view that the problems experienced by homosexuals were more often the result of "personal conflicts" than of stigmatization. "Sexual Survey #4; Current Thinking on Homosexuality," *Medical Aspects of Human Sexuality*, November 1977, 11, pp. 110-111.

Interestingly, homosexuals tend to feel the same way about themselves. About a quarter of homosexuals believe homosexuality is an emotional disorder and 37 percent answered "yes" to "do you think you are psychologically disturbed?" (Bell, A.P. and Weinberg, M.S., *Homosexualities*, Simon & Schuster, 1978; Williams, C.J. and Weinberg, M.S., *Homosexuals and the Military*, Harper & Row, 1971). Homosexual activists blame these feelings on societal oppression, i.e., Western culture's own bias against homosexuals.

Still, when asked "if a teenager who was just starting homosexual activity came to you and asked your advice, what would you tell them?," homosexuals recommended cessation four to one (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunder, 1979).

2. A full account of what many have called "terrorist" tactics is given in Ronald Bayer, *Homosexuality and American Psychiatry* (New York: Basic Books, 1981), pp. 101-154 (a sympathetic account), and Charles W. Socarides, "The Sexual Deviations and the Diagnostic Manual," *American Journal of Psychotherapy*, 32, pp. 414-425.

3. The 1972 Gay Rights Platform, as well as the Gay Teachers Association Bill of Rights, shows the breadth of the homosexual objectives. These include the prohibition of discrimination in employment, housing, public accommodations, public services, the military, federal civil service, and immigration. They want federal funding for homosexual sex education courses in the public schools, aid to homosexual organizations, and release of all homosexuals in prison for sex offenses. They desire the repeal of sodomy laws, laws prohibiting prostitution, and child custody, adoption, visitation, and foster parenting rights. They want the repeal of all laws governing the age of sexual consent, as well as those that prohibit polygamy, transvestism, and cross dressing. And they want laws against those who criticize the lifestyle of homosexuals and other sexual deviates. See Roger J. Magnuson, *Are Gay Rights Right?* (Straitgate Press, 1985), pp. 44-49. Each year Congress attempts to pass homosexual affirmative action laws, sponsored by Sen. Alan Cranston and others.

4. Dorsen, N., ed., *The Rights of Gay People (An American Civil Liberties Handbook)* (Bantam Books, 1983).

5. Most biologists and psychologists believe that homosexual habits are learned. Evidence for this comes from several sources.

1) Most homosexuals believe that their sexual orientation is learned. (Only 9% believed they were born that way in two Kinsey studies: Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P., "Homosexualities: Their Range and Character" in *Nebraska Symposium on Motivation*, Cole, J.K. and Diensthier, J., eds. (Univ Nebraska Press, 1973).

2) No one has found a single replicable genetic, hormonal or chemical difference between homosexuals and heterosexuals. (Marmor, J., ed., *Homosexual Behavior: A Modern Reappraisal* (Basic Books, 1980).

3) Those raised in non-religious homes have a 450 percent higher chance of choosing the homosexual lifestyle. (Institute for the Scientific Investigation of Sexuality, "What Causes Homosexuality and Can It Be Cured?," ISIS, 1984).

4) Most psychologists and psychiatrists still do believe that homosexuality is learned, even those who endorse their behavior. (Examples include Rado, Bierber, Socarides, Kinsey, Hooker, Szaz, Marmor, and Masters and Johnson. Cf. Bayer, R., *Homosexuality and American Psychiatry*, Basic Books, 1981.)

5) Since homosexuals engage in many deviant sexual practices, such as sodomy, sado-masochism, eating feces, drinking urine, fisting, rimming, the solicitation of sex with younger males, etc., it seems almost absurd to say that all of these behaviors are innate.

6) Many homosexuals do change their behavior. If homosexuality were innate, change would not be possible. Compare the studies of Bieber, I., *Homosexuality: A Psychoanalytic Study* (Basic Books, 1962); Socarides, C., "Homosexuality Concepts and Psychodynamics," *International Journal of Psychiatry*, 1972, 10, p. 118; Masters, W.H. and Johnson, V.E., *Homosexuality in Perspective* (Little, Brown, 1979); West, D.J., *Homosexuality Re-Examined* (Duckworth, 1977); Pattison, E.M. and Pattison, M.L., "Ex-gays: Religiously Mediated Change in 11 Homosexuals," *American Journal of Psychiatry*, 1980, 137, pp. 1553-1562. Homosexuals Anonymous, Exodus, and many other groups that help homosexuals change their sexual orientation are build upon this premise. (For a more complete list see the bibliography.) It is interesting to note that no one has sought therapy to change their race, color, or national origin. These are assumed to be innate, in contrast to the homosexual lifestyle.

6. Greek and Roman societies both outlawed homosexual behavior, believing that it was dangerous to the well-being of their society. Throughout the middle ages, homosexuality was outlawed in Western society. It has always been outlawed in the Far East, and still is today. Some authors, however, disagree. Cf. Boswell, J., *Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 1980).

7. For example, in the state of California a woman has already lost her private property rights to not rent her house to an unmarried couple. In another state, a female lost the right to not have a lesbian roommate. When the female decided she did not want a lesbian for a roommate, the lesbian sued and won a settlement of $1500.

8. Magnuson, R.J., *Are Gay Rights Right?* (Straitgate Press, 1985), p. 86.

9. Senator Alan Cranston (D-CA) has been proposing a homosexual affirmative action bill in the U.S. Senate.

10. Hansfield, H.H., "Sexually Transmitted Disease in Homosexual Men," *American Journal of Public Health*, 1981, 9, pp. 989-990; Cameron, P., Proctor, K., Coburn, W. and Forde, N., "Sexual Orientation and STDs," *Nebraska Medical Journal*, 1985, 70, pp. 292-299; Jay, K., and Young, A., *The Gay Report* (Summit, 1979); Cameron, P., Cameron, K, and Proctor, K., "Effect of Homosexuality Upon Health and Social Order," *Psychological Reports*, 1989, 64, p. 1172, report 85 percent for homosexual and 52 percent for bisexual in comparison to 30 percent for heterosexual.

11. Quinn, "The Polymicrobial Origin of Intestinal Infections in Homosexual Men," *New England Journal of Medicine*, 1983, 309 (10), pp. 576-82; Manligit, "Chronic Immune Stimulation by Sperm Allantigens, *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-41; Jaffe, "National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men: Part 1, Epidemiological Results," *Annals of Internal Medicine*, 1983, 99 (2), pp. 145-57; Buchanan and Muir, "Gay Times and Diseases," *The American Spectator*, August 1984, 15.

Drawing upon the standard medical text, *Harrison's Principles of Internal Medicine*, James Fletcher in the *Southern Medical Journal*, sums: "We notice an increasing incidence of multiple-drug-resistant strains of Neisseria gonorrhoeae in homosexuals; male anorectal and pharyngeal infections are frequently troublesomely asymptomatic; a

separate treatment category is required for homosexual men. Considering syphilis, of all men with primary, secondary, or early latent syphilis interviewed in the United States during 1980, one half were homosexual or bisexual; primary syphilis is usually missed in homosexual men. For example, in the US in 1974, 42% of cases of early syphilis in heterosexual men were detected in the primary stage, whereas by comparison only 23% of early cases in homosexual men were detected in the same primary stage. Homosexual men are among those cited at highest risk for lymphogranuloma venereum in the US; infection is often anal or rectal and can therefore produce hypogastric and deep iliac lymphadenitis, so massive at times as to lead to confusion with an 'acute abdomen' and to exploratory laparotomy. Cytomegalovirus infection is of higher prevalence in homosexual men. A newer clinical entity dubbed 'gay bowel syndrome' afflicts the same population and manifests itself as mechanical dysfunction of the lower tract, as well as an impressive array of intestinal infections. All of this information and more is readily available in common medical textbooks" (Holmes, K.K., "Gonococcal Infections" (chap 150), "Syphilis" (chap 177), "Lymphogranuloma Venereum" (chap 193); Meyers, J.D., "Cytomegaloviirus Infection" (chap 211). In Petersdorf, R.G., et.al., eds., *Harrison's Principles of Internal Medicine* (McGraw-Hill, 1983).

In London, the same holds true. According to the *British Journal of Sexual Medicine* (April 1987), over a quarter of homosexuals had had syphilis, a disease rare among heterosexuals, over half had had gonorrhea, more than half non-specific urethritis, and nearly one in five had had herpes. A survey of a thousand patients in 1975, who were attending STD clinics, found hepatitis B infection ten times more common in homosexual than heterosexual men (White, M., *AIDS and the Positive Alternatives* (Marshall Pickering, 1987, p. 45).

12. *San Jose Mercury* (April 24, 1980); "Sharp Increase in Hepatitis and Dysentery in San Francisco," *San Francisco Chronicle Examiner* (April 23, 1979).

SODOMY LAWS

History and Purpose of Sodomy Laws

Most of the world has always outlawed acts of sodomy. Many times the penalties for sodomy were very extreme, including death. The purpose of these sodomy laws was to protect the foundation of every society, the family. Sodomy was considered immoral as well as unhealthy.

The United States has had a long history of laws against sodomy. Whereas the privacy of the institution of marriage has been respected, the courts have not felt that adultery, incest, fornication, and homosexuality are immune from criminal enquiry. Regarding homosexuality, in particular, the state has every right to discourage people from entering into behavior that is psychologically, physically, and socially destructive.

Until recently most of the states have maintained laws against sodomy. Due to recent homosexual activism over the past two decades, about half of the states have overturned these laws, while the other half ignore them.[1] The U.S. Supreme Court, however, has always affirmed that states have the right to outlaw sodomy.[2]

Arguments for Sodomy Laws

Sodomy laws protect the victims of sodomy

Many people believe that sodomy is a victimless crime, and therefore, should be legalized like pornography, prostitution, and other sexual deviations. Yet, like pornography and prostitution, sodomy has many victims.

Although homosexuals represent 1-4 percent of the total population, they perpetrate between a third and a half of all recorded child molestations.[3] Homosexual teachers have committed between a quarter and 4/5s of all molestations of pupils. Thus they are at least 12 times more apt to molest children than heterosexuals are, and homosexual teachers are at least seven times more likely to molest a pupil. In surveying the literature on pupil child molestation, one investigator found that teachers who practice homosexual acts are between 90 to 100 times more apt to involve themselves sexually with pupils than teachers who confine themselves to heterosexual acts.[4] New York homosexual teachers agreed that homosexual relationships with their students were improper, but reserved the right to have relations with children outside the classroom.[5]

Homosexuals are about 18 times more apt to incorporate minors into their sexual practices than heterosexuals are. In fact, 31 percent of those claiming molestation by men before they had reached age 13 were homosexually assaulted.[6] One survey by two homosexual authors found that 73 percent of homosexuals had at some time had sex with boys 16-19 years old or younger.[7] It is no wonder that one of the stated objectives of the National Gay Task Force is to remove "age of consent" laws from state statutes, permitting voluntary sex with minors.[8]

Out of all of the mass murders in the U.S. over the past 17 years, homosexuals killed at least 68 percent of the victims, were implicated in at least 41 percent of the sets of crimes, committed 70 percent of the 10 worst murder sets, and were involved in five of the eight murder sets perpetrated by two or more people.[9]

These are amazing statistics when considering that homosexuals compose about 1-4 percent of the American population. Yet "if people mix sex and violence, it is reasonable to expect that at times the violence will become homicidal," writes the Family Research Institute. "Gay sex is disproportionately violent sex. A third of gays and an eighth of lesbians admit to sadomasochism (hurting or being hurt as a part of sexual 'fun'). This is a rate at least 600 percent greater than heterosexual males and 400 percent more than heterosexual females claim. Similarly, over a quarter of male gays and 8 percent of lesbians admit to urinating on sexual partners. Again rates over 450 percent higher than for heterosexuals."[10]

Similarly, about twice as many homosexuals report having contemplated suicide as compared to heterosexuals, and about three times as many homosexuals admit to having attempted suicide.[11]

A quote from the guest editorial from the mainstream *Gay Community News* of February 15-21, 1987 by Michael Swift summarizes the homosexual danger to innocent individuals: "We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker

rooms, in your sports arenas, in your seminaries, in your youth groups, in your movie theater bathrooms . . . Wherever men are together . . . Our only gods are handsome young men . . ."

Though by no means typical of all homosexuals, this quote, published in a mainline homosexual publication, makes anyone concerned about their children wary, especially when taking into consideration the record of homosexuals. Thus, for the protection of other individuals the acts of sodomy must be made illegal.

Sodomy laws seek to curtail a behavior that is destructive to homosexuals

Due to homosexual sexual practices, male homosexuals are 14 times more apt to have had syphilis than heterosexuals, 3 times more apt to have had gonorrhea, 3 times more apt to have had genital warts, 8 times more apt to have had hepatitis, 3 times more apt to have had lice, 5 times more apt to have had scabies, 30 times more apt to have had an infection from penile contact, hundreds of times more apt to have had oral infection from penile contact, and over 5000 times more apt to have AIDS, though this latter number is now decreasing.

In comparison to heterosexual females, lesbians are 19 times more apt have had syphilis, 2 times more apt to have had genital warts, 4 times more apt to have had scabies, 7 times more apt to have had an infection from vaginal contact, 29 times more apt to have had an oral infection from vaginal contact, and 12 times more apt to have ever had an oral infection from penile contact.[12]

These diseases are a direct result from their homosexual behavior. (These next few paragraphs, only adults should read, since they graphically detail homosexual behavior.) Over 90 percent of male homosexuals participate in the insertion of the penis into the rectum of sex partners. This practice carries great risk for both participants. Fecal material can enter through the urethra. And sperm breaks through the single layer of the columnar epithelium of the rectum, causing massive immunological disruptions in the blood system, making the person at much greater risk for infections.

About 90 percent of male homosexuals and 65 percent of lesbians report having engaged in oral/anal sexual activity, inserting the tongue into or licking the anus. About 70 percent of male homosexuals and 25 percent of lesbians report some regularity of this practice. Seventeen percent of homosexuals admit to eating and/or rubbing themselves with the feces of partners and an additional 12 percent report giving and receiving enemas as part of sexual pleasure. Homosexual men ingest, on the average, the fecal material of 23 different men per year. Yet ingestion of fecal material under any circumstances is unsound.

These practices are combined with others that are also medically unsound: 19 percent of male homosexuals and 4 percent of lesbians report urinating or defecating on their partners, 20 percent of homosexuals report sadomasochism where their partner is hurt, scratched, bruised and/or bloodied, and 41 percent of male homosexuals and 8 percent of lesbians report "handballing" or "fisting" where the hand and arm are inserted into the anus up the rectum of one's partner. It is no wonder that homosexuals are 245 percent more apt to report two or more sexually transmitted diseases than heterosexuals, and were 414 percent more apt to report deliberate infection of others.[13]

The detrimental consequences of this behavior is exploded when the amount of sexual partners with whom homosexuals copulate are examined. Most homosexual exchange occurs between strangers, 70 percent admitting that they had had sex only once with over half of their partners.[14] Homosexuals average somewhere between 20 and 106 different partners per year.[15] The average homosexual has had 300 to 500 partners during a lifetime.[16] Twenty-eight percent of homosexuals have had sodomy with 1000 or more partners, 70 percent with 50 or more partners, and only 2 percent have had what could be described as monogamous or semi-monogamous relationships. Of these monogamous relationships, however, still 5 percent drank urine, 7 percent incorporated fisting, 33 percent ingested feces, 53 percent swallowed semen, and 59 percent received sperm up their rectum during the previous month of the study.[17] Still other studies indicate that "monogamy" for homosexuals lasts between 9 to 60 months.[18]

Homosexual behavior in other countries matches those in the U.S. For example, a survey published in the *British Journal of Sexual Medicine* in April 1987 described the behavior of homosexuals in Britain. The mean age for their first sexual encounter with another male was 15 and one month. In London, over a quarter had had syphilis, over half had had gonorrhea, more than half had had non-specific urethritis, and nearly one in five had had herpes. Most men had had between one hundred and five hundred partners during their lives, and between six and fifty in the past year. Two London residents admitted to having five

hundred partners in one year; twelve admitted to five thousand partners in their lifetime; and 10 percent admitted to having sexual intercourse with between one and five thousand.[19]

Of course, these unhealthy sexual practices are the primary reason for the spread of the deadly AIDS virus in the United States. Seventy to ninety percent of the victims of AIDS are homosexuals. Already over 100,000 people have contracted the disease, 60% of whom have died, and it is estimated that 1.3 million are at present HIV positive and destined to die within 10 years.[20] Homosexuals themselves are the primary perpetrators of this disease, as well as the primary victims.

Thus, for the protection of those with homosexual tendencies, acts of sodomy must be made illegal.

Sodomy laws protect communities and the nation from disease

Though there are direct victims of homosexual behavior, both individuals and the homosexuals themselves, the nation itself is also at risk.

Homosexuals are one of the primary carriers of sexually transmitted diseases. These diseases are not restricted to their own population, but are spread to unsuspecting others. About 40 percent of homosexuals are or were married. Heterosexual sex is practiced either regularly or episodically by the 66 percent of male and 87 percent of female homosexuals who report one or more life-time heterosexual partners.[21]

It is well known that the number of sexual partners that homosexuals have are the primary cause for the spread of AIDS. Formerly called GRIDS (Gay Related Immune Deficiency Syndrome) since it primarily existed among homosexuals, the disease spread to other populations through bi-sexual behavior and the increased drug use of the homosexual population.

Though now rare, homosexual donated blood also spread the disease to hemophiliacs before 1985.[22] Transfusions, once officially touted as low-risk by the medical establishment, also has communicated the disease to thousands of unsuspecting victims.[23]

Clearly, the behavior of sodomy is a threat to public physical health. This promiscuous behavior is one of the primary means of transmission of sexually transmitted diseases, as well as the deadly disease of AIDS. The public cost of the AIDS virus alone may well exceed sixty million dollars by 1991.[24]

Other civil laws regulate bedroom behavior in order to protect both individuals and society

Many argue that the right to privacy includes sexual behaviors of all kinds. Current law, however, regulates many sorts of bedroom behaviors in order to protect both individuals and the community.

Incest and statutory rape are both criminally prosecuted, no matter if they occurred in private or public, whether or not there is consent. The state sets rules on who can get married and who can get divorced. Polygamy is outlawed. Prostitution is illegal, whether in private or public, because it affects individuals, community health, families, and society.[25]

Second, government currently regulates such unhealthy practices as cigarette smoking. TV ads for the deadly practice are banned. It is against the law for minors to purchase cigarettes. Yet sodomy and its effects are much more deadly than cigarette smoking. The practice of sodomy is correlated with many types of crimes, as well as the most deadly diseases. And in America sodomy is blamed as the main cause for the transmission of the deadly AIDS virus which threatens to kill millions and destroy the American health system.

Third, for the most part sodomy is not practiced in the privacy of one's own bedroom. It is a public act. According to *The Gay Report*, a homosexual publication, the most frequent places to practice homosexual behavior are in public rest rooms, bus stations, service stations, public libraries, or rest stops; public parks where groups gather in the bushes; beaches; public baths, or "health clubs" where groups gather to watch others engage in sodomy or go to private booths for themselves; "gay bars" and night clubs; street corners where they "cruise" for others; "glory holes," circular holes cut out of partitions between stalls in public restrooms allowing anonymous oral sodomy with the person in the next stall; and pornographic bookstores, peep shows, or movie houses.[26] Out goes the "privacy of your own bedroom" argument. These public acts of sodomy should be outlawed.

Last, the right to privacy has only been found in the context of the nuclear family. Sex between consenting adults outside marriage has not been constitutionally protected as a fundamental right.[27]

Western civilization has always outlawed sodomy

To do away with sodomy laws goes against the accumulated wisdom of centuries of known civilization. In sixteenth-century England, Henry VIII made sodomy a felony and imposed the death penalty for the "detestable and abominable vice of buggery." Sir Edward Coke and Blackstone, the legal authority even of the American colonies, concurred. The death penalty remained there until 1861 when the Offenses Against the Person Act reduced the punishment to a maximum of ten years' imprisonment.[28]

The Founders of this nation also advocated strict sodomy laws. Thomas Jefferson, in his revision of the criminal code of Virginia during the Revolution, prescribed penalties for rape and sodomy. For the male he prescribed castration and for the female a hole, no less than one-quarter inch in diameter, bored through the cartilage of the nose.[29]

Until the 1970's the U.S. Supreme Court appeared to take it for granted that states have the power to outlaw sodomy. Since that time, the Court has not protected homosexual activity under the Constitution. It has clearly held that there is no constitutional right to engage in homosexual sodomy.

Endnotes

1. States that still have sodomy laws on the books as of February 1985 include Alabama, Arizona, Arkansas, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, Oklahoma, Pennsylvania, Rhone Island, South Carolina, Tennessee, Texas, Utah, Virginia (Magnuson, R.J., *Are Gay Rights Right?* (Straitgate Press, 1985)).

2. After summarizing the recent developments in the U.S. Supreme Court on the subject, Magnuson concludes, "The Supreme Court seems to be protecting the right to free speech, but not any so-called right to commit sodomy. This is not entirely consistent, but then, the Supreme Court has not spoke definitively in either case" (Magnuson, R.J., *Are Gay Rights Right?*, p. 102.)

3. Cameron, P., Coburn, W., Jr., Larson, H., Proctor, K., Forde, N. and Cameron, K., "Child Molestation and Homosexuality," *Psychological Reports*, 1986, 58, pp. 327-337. Summarizing past studies on the topic, the authors report: "The original Kinsey data (Gebhard & Johnson, 1979 [*The Kinsey Data*, Saunders, 1979]) indicated that 37% of the gays and 2% of the lesbians admitted to sexual relations with under-17-yr.-olds, and 28% of the gays and 1% of the lesbians to sexual relations with under-16-yr.-olds while respondent was aged 18 yr. or older. In the second Kinsey Institute study (Bell & Weinberg, 1978 [*Homosexualities*, Simon & Schuster, 1978]) a quarter of gays admitted to sexual relations with under-16-yr.-olds while respondents were aged 21 yr. or older. Similarly, in the *Gay Report* (Jay & Young, 1979 [Summit]), 23% of the gays and 6% of the lesbians admitted to sexual interaction with youth less than 16 yr. of age since respondents were aged 20 yr. Schofield performed a random survey of British 15- to 19-yr.-old youth (1965 [*The Sexual Behavior of Young People*, Little, Brown]), and 35% of the boys and 9% of the girls claimed to have been approached for sex by adult homosexuals; 2% of the boys and 1% of the girls admitted to succumbing" (p. 336). Cf. Timnick, L., "The Times Poll," *Los Angeles Times*, 1985 (August 25-26), p. 104.

4. Cameron, P., "Homosexual Molestation of Children/Sexual Interaction of Teacher and Pupil," *Psychological Reports*, 1985, 57, pp. 1227-1236. It is no wonder that a 1977 *Boston Globe* poll showed that every local and national poll indicated that an overwhelming majority of people opposed hiring homosexuals as teachers (Dressler, J., "Gay Teachers: A Disesteemed Minority in an Overly Esteemed Profession," *Rutgers/Camden Law Journal*, 1978, 9 (3), pp. 399-445).

5. "Homosexual Love Away From School Is O.K., Gay Teachers Say," *New York Post*, July 11, 1979, p. 5.

6. "Child Molestation and Homosexuality," Institute for the Scientific Investigation of Sexuality, 1987; cf. Cameron, P., et al. and Cameron, P. studies above in *Psychological Reports*. The original Kinsey data (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunders, 1979) indicated that 37 percent of the gays and 2 percent of the lesbians admitted to sexual relations with under-17-year-olds, and 28 percent of the gays and 1 percent of the lesbians to sexual relations with under-16-year-olds while respondent was aged 18 year or older.

7. Jay, K. and Young, A., *The Gay Report* (Summit, 1979), p. 275. They also report that 23 percent of gays and 6 percent of lesbians admitted to sexual interaction with youth less than 16 years of age

since respondents were aged 20 years old. Schofield (*The Sexual Behavior of Young People*, Little, Brown, 1965) found that out of 15 to 19 year-old British youth, 35 percent of the boys and 9 percent of the girls claimed to have been approached for sex by adult homosexuals; two percent of the boys and 1 percent of the girls admitted to succumbing.

8. 1972 Gay Rights Platform, drawn up at the national Coalition of Gay Organizations convention (Chicago, 1972). Rueda E.T., *The Homosexual Network* (Devin Adair, 1982).

9. "Murder, Violence and Homosexuality," Institute for the Scientific Investigation of Sexuality, 1987; cf. Allen, C., *A Textbook of Psychosexual Disorders*, 2nd ed. (Oxford University Press, 1969) and de River, J.P., *The Sexual Criminal*, 2nd ed. (C.C. Thomas, 1956).

10. "Murder, Violence and Homosexuality,"; cf. Gebhard, P.H., and Johnson, A.B., *The Kinsey Data* (Sanders, 1979).

11. "Murder, Violence and Homosexuality;" cf. O'Hara, K., "On Double Suicide," *Psychiatricia et Neurologica Japonica*, 1962, 44, p. 8.

12. "Medical Aspects of Homosexuality," Institute for the Scientific Investigation of Sexuality, 1985; cf. Jaffe, H.W., and Keewhan, C., et. al., "National Case-Control Study of Kaposi's Sarcoma and Pneumocystis Carinii Pneumonia in Homosexual Men; Part 1, Epidemiologic Results," *Annals of Internal Medicine*, 1983, 99 (2), pp. 145-157; cf. footnote no. 10 in "Gay Rights" Ordinances section.

13. "What Homosexuals Do," Institute for the Scientific Investigation of Sexuality, 1987; Jay, K. and Young, A., *The Gay Report* (Summit, 1979), pp. 490-93, 553-96, 563-4, 567; Hart, J., "'Safe Sex' and the Presence of the Absence," *National Review*, May 8, 1987, p. 43; Quinn, T.C., Stamm, W.E., et.al., "The Polymicrobial Origin of Intestinal Infections in Homosexual Men," *New England Journal of Medicine*, 1983, 309 (10), pp. 576-582; Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978).

14. Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978).

15. Corey, L. and Holmes, K.K., "Sexual Transmission of Hepatitis A in Homosexual Men," *New England Journal of Medicine*, 1980, 302, pp. 435-438. Dr. Winkelstein of the School of Public Health at University of California, Berkeley, found that after several years of intense community-wide education about "safe sex," nearly 20 percent out of 1034 single men had over 50 sexual contacts in the two years prior to the study ("Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus," The San Francisco Men's Health Study, *Journal of American Medical Association*, 1987 (January 16), 257 (3), p. 323. One homosexual states in *The Gay Report*, "I believe my estimate of 4,000 sex partners to be very accurate. I have been actively gay since I was 13 (thirty-one years ago). An average of two or three new partners per week is not excessive, especially when one considers that I will have ten to twelve partners during one night at the baths" (p. 250).

As a result of AIDS, some homosexuals are slightly changing their behavior. Dr. Morin, gay activist and chairman of the American Psychological Association's ethics committee reported that the 824 homosexuals he studied lowered their sex-rate from 70 different partners per year in 1982 to 50 by mid-1984 (Stewart, S.A., *USA Today*, November 21, 1984). McKusick reported declines from 76 to 47 in the same period (McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men in San Francisco," *American Journal of Public Health*, 1985, 75, pp. 493-96). Dr. Hunter Handsfield, Director of the Sexually Transmitted Disease Control Program in Seattle, notes, however, that in the face of AIDS, these changes in behavior are "almost ludicrous" (Letters to the Editor, *American Journal of Public Health*, December 1985, 75, pp. 1449-1450.

16. Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Allonantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50.

17. McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men in San Francisco," *American Journal of Public Health*, 1985, 75, pp. 493-96.

18. Kinsey found that about 60 percent of the homosexuals he interviewed said that they would not want a monogamous relationship (Gebhard, P.H. and Johnson, A.B., *The Kinsey Data*, Saunder, 1979). Kinsey and others found that the longest "marriages" average two or three years, and that most homosexuals engage in sexual relationships

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with others about half way through the relationships (Bell, A.P., Weinberg, M.S. and Hammersmith, S.K., *Sexual Preference* (Indiana University Press, 1981); Institute for the Scientific Investigation of Sexuality, "The Psychology of Homosexuality," ISIS, 1984. There is now some evidence that the quantity of homosexual acts are decreasing between different parters due to the threat of AIDS, though whether this decreased will be sustained is unknown.

19. White, M., *Aids and The Positive Alternatives* (Marshall Pickering, 1987), pp. 73-75.

20. Rueda, E.T. and Schwartz, M., *Gays, AIDS and You* (Devin Adair, 1987) cites the Department of Health and Human Services with an estimated 1.5 million Americans infected with HIV or the AIDS virus, though they admit that some private groups estimate three times the number of cases. They write, "If those estimates are reasonably accurate, then at least 94 percent, and possibly as many as 98 percent of the people who are infected with AIDS have not been tested and are unaware that they are carriers of the disease" (p. 7). Rueda and Schwartz say that 75 percent of the victims of AIDS are homosexuals. The Center for Disease Control reports that at least 90 percent of reported cases can be attributed to the combination of homosexual activity and/or drug use (Garriss, J.V., *AIDS: Civil Rights or Civil Wrongs*, National Perspective Institute, 1986, pp. 9-10). Lawrence J. and Brian F. McNamee (*AIDS: The Nation's First Politically Protected Disease*, National Medical Legal Publishing House, 1988) report the CDC finding of 80-90 percent of the infected outside continental Africa are homosexual. The most important route of transmission of AIDS is anal sodomy (Felberbaum & Salzberg, "Epidemiology and Risk Factors Associated with AIDS in AIDS and Related Infectious Diseases, *Topics in Emergency Medicine*, 9, July 1982, p. 5).

21. Bell and Weinberg reported that as many as 65 percent of more of practicing homosexuals report having engaged in heterosexual coitus and 20 percent or more are or have been married (*Homosexualities*, Simon & Schuster, 1978, p. 162). Robert Hawkins, associate dean at the School of Allied Health Professions, concurs that most male homosexuals report having had sexual activity with women (Sivak, S., et. al., "How Common is HTLV-III?," *New York Magazine*, October 7, 1985, p. 85). About 16 percent of the women in the U.S. currently infected with AIDS contracted the disease from contact with bisexual men (McNamee, L.J., & McNamee, B.F., *AIDS*, National Medical Legal Publishing House, 1988, p. 69).

22. There are now roughly 12,000 to 20,000 blood transfusion recipients infected by blood transfusions (Heilig, S., "Lookback Programs Track HIV-Positive Donors' Blood," *California Physician*, July 1987, p. 20). Some studies estimate that more than 90 percent of hemophiliacs now carry the AIDS antibody (*Answers About AIDS*, American Council on Science and Health, January 1986, p. 16).

23. Dr. Curran of the CDC, along with others such as Dr. Jeffrey Green of New York University Medical Center, minimized the risks of blood transfusion in 1983 (O'Connor, W., "AIDS: The Alarming Reality," *HIVE Foundation*, October 16, 1986, p. 10).

24. "The Nation Comes to Grips With the Widening Problems of AIDS," *Wall Street Journal* (May 18, 1987).

25. Homosexuals themselves understand the connection between these behaviors and their practices. Thus, they desire to lower the age of consent so that they can enjoy sexual relations with children, and desire to legalize both prostitution and polygamy.

26. Jay, K. and Young, A., *The Gay Report* (Summit, 1979), p. 500. Cf. Rechy, *The Sexual Outlaw* (Grove Press, 1977) and the *Gayellow Pages*, a reference book widely circulated in the homosexual community that gives a state-by-state, city-by-city description of where homosexuals congregate, and for what purpose.

27. See Bowers v. Hardwick, 478 U.S. 186 (1986); Johnson v. San Jacinto Junior College, 498 F. Supp. 555 (S.D. Tex. 1980); *cert. denied sub nom.* Day v. South Park Indep. School Dist., 474 U.S. 1101 (1986). Judge Harlan stated: "The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced . . . but the intimacy of husband and wife is necessarily and essential and accepted feature of marriage, an institution which the State not only must allow but which always and in every age it has fostered and protected" (Poe v. Ullman, 367 U.S. 497, 552-553 (1961).

28. Bayer, R., *Homosexuality and American Psychiatry* (Basic Books, 1981), p. 17.

29. Jaffa, H.V., "Sodomy and the Future of the Academy," *The Proposition*, April 1989; Jaffa, H.V., "The Right To Be Queer: A Very Queer Right," *The Proposition*, March 1987.

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HOMOSEXUAL ALTERNATIVE LIFESTYLE EDUCATION

Purpose of Homosexual Sex Education

In their effort to convince the American populace that homosexuality is an alternative lifestyle, homosexual groups have attempted to change the sexual education classes of the public and private school systems. They have worked diligently to portray their perverse and unhealthy behavior as just an alternative lifestyle. In order to be morally "unbiased," many public school educational programs have adopted this "lifestyle" education assumption.

Arguments Against Homosexual Sex Education

Such sex education presupposes that homosexuality is an "alternative lifestyle," a moral statement

Sex education that teaches homosexuality as an "alternative lifestyle" is making a moral statement. Most would agree that sexual responsibility, i.e. morals, should be taught in conjunction with sexual education. The two topics cannot be divorced from one another.

Yet teaching homosexuality as an "alternative lifestyle" is teaching a morality not believed by the surrounding community. No heterosexual community in the United States endorses the morality of acts of sodomy. Half the states still outlaw sodomy.

Likewise, American communities do not believe that the homosexual lifestyle is morally neutral. They do not endorse the common homosexual practices of fisting, swallowing urine and feces, sadomasochism, and the multiple and impersonal nature of homosexual sexual acts.[1] (See above for more detailed statistics and description of these acts.)

In sum, sex education that endorses homosexuality as morally neutral and as an "alternative lifestyle" forces what most to believe an immoral morality upon the majority of U.S. citizens.

Many times these sex education classes presuppose that ten percent of the population are homosexuals

Alfred Kinsey interviewed thousands of individuals during the 1940's and found that about 10 percent of the male population were "more or less" exclusively homosexual for about three years of their lives. The numbers were significantly less for homosexuals for more than three years. Only about four percent of males and between one and three percent of females were found to be exclusively homosexual.[2] Based on this ten percent figure, though, some sex education programs are using the public junior high and high schools to identify ten percent of teens, and help them engage in a more "healthy" homosexuality, putting them in contact with other homosexual individuals and groups. The Los Angeles County Project 10 which does this is headed by a lesbian.

First, this ten percent figure is misleading, if not purely inaccurate. Since 1981 three studies have randomly sampled twelve different areas of the United States and have arrived at similar conclusions.[3] About 96 percent of the population consider themselves exclusively heterosexual, while about 4 percent consider themselves bi- to homosexual. Only 1-3 percent consider themselves exclusively homosexual.

Second, the sample populations interviewed about their sexual preferences were adults, rather than children.[4] Thus, they could be very non-representative of the population in junior high or high school ages. It is during these years that sexual identity is formed. By teaching homosexuality as an "alternative lifestyle," the classes are actually encouraging homosexuality, rather than heterosexuality.

Third, a statistical description of a population is not a prescription for action. In other words, just because 4 percent of the population are bi- or homosexuals does not mean they should be, or that others should be. Drug abuse, sexual promiscuity, and teenage pregnancy are rampant in high school populations; this does not mean that these actions should be encouraged. It would be absurd to offer classes on how to take drugs safely, or how to get pregnant safely. Yet that is what these sex education classes are doing regarding homosexuality. If sodomy is wrong, if it is unhealthy, if such acts spread disease and even death, these acts should be discouraged rather than taught as an "alternative lifestyle."

Such sex education classes are not scientific in their descriptions of the homosexual lifestyle and its consequences

Sex education classes that describe homosexuality as an "alternative lifestyle" do not adequately describe the homosexual lifestyle so that children and teenagers can make informed decisions. Sidney Hook, no conservative on family issues, while lunching with a friend at a park, asked his friend, "Ralph, I want you to tell me something I don't know. What exactly do homosexuals do?" So the friend told him. Hook's glasses came down a bit on his nose, and then he said, "That's disgusting!"[5]

If children and teens are to be given the opportunity to a rational, well-informed choice, they must be given the facts. They must be told about the percentages of homosexuals who have anal intercourse, eat feces and drink urine, engage in fisting and pour urine on one another. They must be briefed about the places where most homosexual activity is performed: public bathrooms, bars, porno shops, etc. They must be informed about the transitional relationships between homosexuals, and that they have hundreds of partners over a lifetime. They must be told about the increased chance of contracting venereal disease and even the deadly AIDS virus. They should know that many psychiatrists and psychologists still maintain that homosexuality is psychologically abnormal, despite the politically motivated change in their official diagnosis.[6]

Most likely, if teachers in sex education classes told students these facts, parents would be outraged. Even the U.S. Congress was outraged when Rep. William E. Dannemeyer attempted to put a description of homosexual behavior in the *Congressional Record*. Other House members described the behaviors as obscene and pornographic. Likewise, when Rep. Dana Rorabacher attempted to display in Congress Mapplethorpe's government-subsidized photographs of homosexual behavior, Congress again objected, saying that they were obscene and therefore inappropriate for display. In a similar manner, parents have every right to object to the description of homosexual perversions in the classroom. But then why should these behaviors be encouraged by teachers, by using the description, an "alternative lifestyle?"

Sex education classes that sterilize homosexuality and its consequences misrepresent the truth. Instead, they recruit children and teenagers, who will not know the facts, into a deadly and disease-ridden lifestyle.

Such sex education promotes increased homosexual exploration by children, disease, and even death

Sex education that teaches homosexuality as an "alternative lifestyle" encourages the very behaviors that most of society attempts to discourage. Early and late adolescents are busy forming their sexual identity that will last them a lifetime. Much research has demonstrated that their early sexual experiences will determine much of their later sexual behavior.[7] Encouraging these adolescents to engage in homosexual behavior, even on a trial basis, will mold them for the rest of their lives.

Since homosexuals have such high rates of disease, teaching sodomy as a sexual alternative is encouraging disease among the nation's youth. Though the use of condoms cuts down the spread of STDs and AIDS among homosexuals, they are not 100% effective. Abstinence, by all scientists' admission, is the best solution to stop the spread of STDs and AIDS. Consequently, many state legislatures are making it mandatory to teach abstinence in state sex education programs.[8] Yet the homosexual lifestyle, built upon instant sexual pleasure gratification, does not lend itself to condom use. Its sexual practices described above (in the sodomy section), its impersonal nature, the quantity of sexual partners, and a 414 percent rate over heterosexuals of deliberate infection of others are practices and values that oppose the use of condoms.[9]

The United States has only seen the tip of the iceberg in homosexual death tolls. Sixty-five percent of homosexuals going to STD clinics in Houston are HIV positive, 75 percent of those in Washington, D.C., and nearly 80 percent in San Francisco. To encourage homosexuality in sex education classes only promotes this disease and death. If the state school system can discourage smoking for health reasons, it should discourage sodomy for health reasons alone.

These sex education classes advocate values in direct opposition to parental values

Most parents do not want their children taught the homosexual lifestyle as an "alternative" to the heterosexuality. Parents want their children to learn about healthy sexuality rather than unhealthy (both medically and psychologically), and what many consider to be immoral, sexuality.

Yet most parents do not even know what their children are being taught in state-run sex education classes. When they do find out, they have consis-

before their child attends any such class.

Consequently, many states are encouraging parents to take more of a part in classroom sex education. Parents want to know specifically about the content of each class time, and be able to give their consent, before the material is presented. This will make sex education programs more community based, and more representative of parental values.

Endnotes

1. With few exceptions, societies throughout world history have disapproved of homosexual behavior. Even today, there are relatively few cultures that endorse or condone sodomy between same sex couples. Frank du Mas, *Gay is Not Good* (Thomas Nelson, 1979) sums up what he considers an historical survey:

"1. No society in history has favored incest (heterosexual or homosexual) as a way of life for its members.

2. The myths and legends of every society studied show heterosexuality predominating over homosexuality.

3. Heterosexuality predominates over homosexuality in the world's erotic literature.

4. Of the world's great religious, moral, and spiritual leaders (Moses, Mohammed, Gandhi, Christ, Confucius, and others) most were heterosexual and married, some had children, all sanctioned heterosexuality, marriage, the family, and children. A few were so dedicated to their work that they did not marry at all; others, like Gandhi, married and had a family but later in life voluntarily sublimated their sex drives. Not one of these leaders openly approved of or practiced homosexuality.

5. Biographies indicate that the very large majority of the world's great achievers in all fields -- science, art, music, literature, political affairs, athletics, business -- were heterosexual and/or married.

6. All societies studied have a traditional, widely practiced heterosexual marriage.

7. Most societies have a ritual of passage to adulthood in which the overwhelming majority of its members assume the sex role indicated by their biological organs.

cially permit homosexual marriage.

10. In thousands of subhuman animal studies, heterosexuality is the overwhelming choice for animals existing in their natural state and having free access to members of both sexes.

11. In thousands of animal studies involving millions of hours of observation of animals in their natural environment, not one case of the homosexual equivalent of heterosexual intercourse has been observed.

The sexual emphasis of history is heterosexual" (pp. 50-1).

2. du Mas (*Gay Is Not Good*) outlines many of the criticisms of Kinsey's report:

"1. It was the first attempt at large scale quantitative study of sexuality, especially homosexuality. . . ."

2. Homosexuals have an intense desire to be accepted as normal; therefore, we can be fairly certain that a disproportionately large number of homosexuals volunteered for the study. Kinsey's sample is greatly distorted and does not represent the actual quantitative occurrence of homosexuality in the general population.

3. Many of the homosexuals who volunteered may have had unconscious motives to prove that everybody has homosexual tendencies, thereby reducing their own guilt and minimizing their societal rejection.

4. Most sick people or neurotics tend to have a circle of friends who share their maladjustments or problems. Therefore, the second and third group of volunteers who came largely from the first group's friends most certainly were similar to them, and errors made in the first group were perpetuated and extended into later groups.

5. The meaning and qualitative significance of sex acts are not sufficiently taken into account by Kinsey et al. A twelve-year-old boy dreaming of girls while engaged in mutual masturbation is tallied as an incident no different from a highly experienced transvestite in black lace underwear performing premeditated fellatio.

6. Kinsey purports to make a scientific study of human sexuality but at the same time omits those complex qualitative aspects of their lives that are uniquely human.

7. Kinsey implies that normal is equal to a large number. Ashley Montague [Geddes, D.F. and Curie, E., *About the Kinsey Report*, New World, 1948] points out that there are millions of people with criminal tendencies, but the size of their number does not make them normal, natural, or desirable.

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8. Legman [Legman, G. In Lockridge. N., *The Sexual Conduct of Men and Women*, Hogarth, 1948] makes the point that Kinsey equated the idea of maximum with optimum. He further states that Kinsey uses a four-fold statistical bastion to safeguard his ignorance of what homosexuality really is.

9. Bergler [Bergler, E., "The Myth of a New National Disease," *The Psychiatric Quarterly*, January 1948] suggested that the Kinsey study has created a dangerous and absurd illusion of a new national disease of which fifty million people are victims. He criticizes Kinsey for labeling disease as health when he speaks of a heterosexual-homosexual continuum or balance.

10. Cleckley [Cleckley, H., The *Caricature of Love*, Ronald, 1957] shows that Kinsey in his statistical tables purports to be scientific but then repeatedly makes very unscientific value judgments almost always in favor of homosexuality as normal, natural, and healthy.

11. Many other experts in the field believe that instead of thirty-seven percent of white males being exclusively or predominantly homosexual (as Kinsey's statistics imply), the percentage is closer to one to five percent [Magee, B., *One in Twenty: A Study of Homosexuality in Men and Women*, Stein & Day, 1966].

12. The United States has more than twenty million blacks. Yet not one black was included in the Kinsey study." [Cf. Bergler, E., *Homosexuality and the Kinsey Report*, Citadel, 1954; Bergler, E. and Kroger, W., *Kinsey's Myth of Female Sexuality*, Grune & Stratton, 1954; Cleckley, H.M. (4th ed.), *The Mask of Sanity*, Mosby, 1964] (pp. 153-56).

3. Bell, A.P., Weinberg, M.S. and Hammersmith, S.K., *Sexual Preference* (Indiana University Press, 1981); Cameron P. and Ross, K.P., "Social Psychological Aspects of the Judeo-Christian Stance toward Homosexuality," *Journal of Psychology and Theology*, 1981, 9, pp. 40-57; Hunt, M., *Sexual Behavior in the 1970s* (Playboy Press, 1974).

4. Kinsey also oversampled a deviant population to begin with (Karlen, A., *Sexuality and Homosexuality*, Norton, 1971).

5. William F. Buckley, Jr., "Remembering Sidney Hook," *National Review*, September 1, 1989, p. 55.

6. According to the latest polls of American psychiatrists, there is still widespread opposition to the APA's official position of homosexuals' normalcy. In a survey conducted in 1977, analysis of the first 2,500 responses to a poll of 10,000 psychiatrists found that 69 percent believed that homosexuality usually represented a pathological adaptation. Only 18 percent disagreed with this proposition. Sixty percent of the respondents asserted that homosexual men were less capable of "mature, loving relationships" than their heterosexual counterparts. Finally, 70 percent supported the view that the problems experienced by homosexuals were more often the result of "personal conflicts" than of stigmatization. "Sexual Survey #4; Current Thinking on Homosexuality," *Medical Aspects of Human Sexuality*, November 1977, 11, pp. 110-111.

7. Erikson, E., *Childhood and Society* (Norton, 1950/63) makes the adolescent stage key in sexual and adult role development. In the first Kinsey study (Gebhard, P.H., Gagnon, J.H., Pomeroy, W.B. and Christenson, C.V., *Sex Offenders*, Harper & Row, 1965, p. 468), 48 percent of the boys with *any* childhood homosexual experience adopted homosexual habits. The Institute for the Scientific Investigation of Sexuality (ISIS) found in 1985 that 96 percent of heterosexual males and 97 percent of heterosexual females reported that their first sexual experience was heterosexual while 85 percent of the gays and 29 percent of lesbians said that their first sexual experience was bi- or homosexual.

8. California, for example, currently mandates that abstinence be taught in every sex education class. The overwhelming evidence supports abstinence sex ed, rather than contraceptive sex ed, both in the curtailment of teenage pregnancy and in the prevention of AIDS. See Gasper, J. (ed.), *What You Need to Know About AIDS* (Servant, 1989) for an excellent summary of both evidence supporting abstinence and abstinence-based sex ed programs.

9. "Criminality, Social Disruption and Homosexuality," 1988, Institute for the Scientific Investigation of Sexuality (ISIS). In fact, Robert Schwab, a homosexual activist and late president of the Texas Human Rights Foundation, proclaimed: "There has come the idea that if research money (for AIDS) is not coming at a certain date, all gay males should give blood . . . whatever action is required to get national attention is valid. If that includes blood terrorism, so be it" (*Dallas Gay News*, May 20, 1983).

"DOMESTIC PARTNERSHIP" LAWS DEFINITION OF THE FAMILY

History of "Domestic Partnership"

The number of people sharing a home without blood or contractual ties has been growing for more than two decades. Though in 1988 married couples made up 56 percent of the nation's 91.7 million households, according to the Census Bureau, 2.8 percent were households where unmarried couples of the opposite sex lived together. This proportion has almost doubled since 1970. Unrelated people of the same sex made up 1.7 percent. In addition, 8 percent of the total are composed of single-parent households.[1]

"Domestic partners," as they are starting to be called, do not obtain the same benefits as more traditional families. Companies many times deny pension funds and life insurance payments to unrelated named beneficiaries. Families have successfully blocked bequests made to unrelated loved ones. Parents have been denied custody and visitation rights because they live with someone not related to them. Unrelated applicants for renter's insurance must usually buy separate policies. Even unmarried homeowners are sometimes told by authorities that they must move because zoning ordinances prohibit unrelated individuals from living together.

With the increase in single-parents, unmarried opposite sex couples, homosexual couples, and roommate living situations due to longer waits before marriage, cities are starting to change their definition of the family so that more benefits can be obtained for people dwelling in these varied living situations. West Hollywood has enacted health benefit ordinances for domestic partners. Though previously vetoed by Mayor Dianne Feinstein in 1982, the San Francisco Board of Supervisors recently passed domestic partnership legislation. Yet before it could go into effect, opponents submitted a 27,000-signature petition to City Hall to force a public referendum on the matter in November 1989. When allowed to decide for themselves, voters overturned the ordinance, though narrowly. The ordinance would have established a registry system whereby couples may register their relationship with the city or county clerk. To qualify, they must have lived together six months. After qualification, they would have been eligible for bereavement leave if they worked for the city or county. And if their partner was in the hospital, they would have had visitation rights. The city was supposed to also create a task force to study the extension of city and county employees' health benefits to their partners, which would have been paid for by the employee.

Other cities have followed suit. Berkeley, Madison, Santa Cruz, and Takoma Park, a suburb of Washington, D.C., all have similar legislation. In these cities, a variety of interpersonal living arrangements qualify for health insurance, bereavement leave, insurance, annuities and pensions, and such rights as housing, adoption, and inheritance. According to homosexual lobby groups, the aim is to include federal income tax and veterans' benefits as well. Even the transfer of frequent flier benefits to homosexual partners is sought, along with family auto insurance.

In New York City, Judge Vito J. Titone, writing for the majority opinion, dismissed a narrowly construed definition of the family. Instead, he wrote, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." Thus, the court ruled that a homosexual lover qualified as a family member and had the right to stay in his deceased partner's rent-controlled apartment.

Arguments Against "Domestic Partnership"

"Domestic partnership" definitions of the family reward lack of commitment

By the very nature of the marriage contract, a couple who has married has covenanted together for a life-time. They have committed themselves to love and honor each others' wishes, engaging in self-sacrifice on each others' behalf.

Those who are married, promise to stay together to raise children. The family setting, with a long-term married man and woman, is the best setting in which to raise children. Children need both a mother and a father to develop a healthy sexual identity. They need the consistency of both spouses for all their lifetime. Divorce has measurable negative consequences to both young and older children.[2]

According to George Gilder, the marital bond anchors the male sex drive to one woman, and to the provision of a family. Most occupations favor hiring married men over single men because they know married men have more motivation to work, save, and climb the ladder of their profession. There is a direct correlation between the number of children that a man has and the amount of his income. Thus, the work ethic is greatly supported by the traditional definition of the family.[3]

"Domestic partnership" interpretations of the family help undermine this type of support that children, and indeed society, so desperately need. Such interpretations of the family encourage short term relationships, where couples are not financially responsible toward one another.[4]

Domestic partnership relationships want rights without responsibility

Live-in heterosexual couples can easily enter into a legal marital relationship if they so desire. Foster parents can usually adopt the children they take care of. Most relationships that are long-term can be made legal in the sight of the law.

This is not the problem. Most do not make these relationships long-term in the eyes of the law because they do not want the responsibilities that legal long-term relationships imply. Heterosexual couples do not get married because they don't want the pressures of commitment. They want an easy way out, just in case the relationship "doesn't work." And in fact, only one-third of such live-in relationships result in marriage.[5] Likewise, foster parents do not desire adoption since it would imply many legal ramifications that they are not willing to enter.

It then appears that most of these groups who want to be defined "domestic partners" want the benefits without the responsibilities of the more traditional family arrangements. Another case supports this point. Homosexual domestic partners don't want to be financially liable the way a spouse would be if his partner covered by a lover's health insurance policy contracts AIDS or some other catastrophic illness not adequately covered by the insurance. They want rights without responsibilities.[6]

The definition of "domestic partnership" is too vague

Potential domestic partners must prove a certain degree of financial interdependence, shared living arrangements, and a commitment to mutual caring. They don't even need a sexual relationship.[7]

This definition is simply too vague, and can be severely abused. No conservative, even Andrew Sullivan of *The New Republic* believes, "In principle, an elderly woman and her live-in nurse could qualify. A couple of uneuphemistically confirmed bachelors could be DPs. So could two close college students, a pair of seminarians, or a couple of frat buddies. Left as it is, the concept of domestic partnership could open a Pandora's box of litigation and subjective judicial decision-making about who qualifies."[8] Ad hoc decisions about what sorts of living arrangements qualify as a domestic partnership or a family will be left to the courts and local governments.

This vague definition of the family will greatly increase the monetary cost to society

Since virtually anyone who can convince the courts that they qualify as a "domestic partnership" will obtain all the benefits usually obtained for more traditional families, the monetary costs of insurance, pension and annuity plans, etc. will greatly increase to both state and local governments. A logical result of these kind of ordinances will be to force private businesses to "not discriminate" and also give traditional benefits to domestic partnerships.

Before Seattle had a chance to adopt its own domestic partnership ordinance in the Spring of 1989 that would have required both public and private employers to provide these benefits to those in this expanded definition of the family, businesses rose up in opposition which made the politicians retreat, at least for the moment. "We knew it would have a skyrocketing effect on cost because there were virtually no controls in place," says Molly A. Swain, communications manager for Blue Cross of Washington and Alaska in Seattle.[9]

Those who are committed to long-term relationships with their spouse and children should not be forced to pay higher insurance premiums to cover those who do not wish to have such commitment.

A weakened definition of the family will hurt the poor the most

Strong traditional families must be supported by governmental policy. Such policies must reward long-term commitments by opposite-sex partners. When policies reward the breakdown of these relationships, women and the poor suffer the most.

At present many policies reward both the female and the male for short-term relationships. Such policies as "no-fault" divorces, the absence of the

father's right to keep his wife from having an abortion, and more welfare support for single mothers have encouraged alternative marital relationships.

As a consequence, single mothers and their children now compose a majority of those living in poverty in the United States. Fathers refuse to pay child support. And mothers are rewarded for having more children out of wedlock, or for killing their unborn children using government funding.[10]

Including homosexual couples in "domestic partnership" definitions will have detrimental effects upon children

The inclusion of homosexual couples as "domestic partners" opens the doors to many problems. One of these problems is that homosexuals will be able to legally adopt children or raise foster children.

This possibility will have several detrimental effects upon children. First, homosexual relationships are highly unstable. In an age where the divorce rate among heterosexuals is 50% in the U.S., the instability of heterosexual relationships are infinitesimal in comparison to homosexual relationships. Most homosexual partners admit having hundreds of partners during their lifetime, and many admit to thousands. Average "monogamous" relationships last nine to sixty months, and yet those monogamous partners admit to having sex with a minimum of one other partner during each week.[11]

Second, homosexual couples make poor sex-role models for children. Homosexual relationships are much more centered around self-centered eroticism than heterosexual relationships. Their impersonal acts of sodomy, fecal and urine ingestion, sado-masochism, fisting, fellatio, etc. are not healthy models to children. Psychologists have consistently demonstrated that having a committed male and female in the home provide the best role-models for children. Children desperately need intimacy with both sexes in a parental relationship. If they do not experience these, they will experience much sexual identity confusion in later years. Many believe, in fact, that homosexuals themselves were raised in such homes, and now suffer sexual identity confusion.[12]

Third, homosexuals have high rates of child abuse and molestation. When three-quarters of homosexuals admit having sex with children 16-19 years of age, and homosexual teachers have a 90-100 times greater probability to molest their students, it is no wonder that homosexuals are working hard to drop the age of consent to sexual relations. Children who have had homosexual relations at an early age are much more likely to later become homosexuals.[13]

Last, children who are reared by homosexuals will learn not only a lifestyle considered by many to be perverse and psychologically abnormal, but disease-ridden. Children will model homosexual sexual behaviors that are linked to numerous diseases, as well as AIDS. If heterosexual couples trained their children in such unhealthy practices, a child might be taken away from them due to possible "physical abuse" or "emotional abuse." The children of homosexuals will suffer a lifetime.

Endnotes

1. Diegmueller, K., "Extended Definition of Family Fuels Partnership Controversy," *Insight*, August 7, 1989, p. 18.

2. "It is estimated that as many as one-third of today's children will experience their parents' divorce and close to one-half will spend some time in a single parent family before the age of 18" ("The American Family Under Siege: An Analysis of Social Change Affecting the Family 1950-1990," Family Research Council, 1989).

The effects of divorce upon children and adolescents can be devastating. Arnold Stolberg and James Anker cite problems common to children of divorce already identified as: higher rates of delinquency, enuresis [bedwetting], depression, aggressiveness to parents, sexual acting out and school problems. They have significantly poorer cognitive performance and social interaction skills. Also the perceptual experience of some children of divorce is one of self-blame, of feelings of being different from their peers, and of a heightened sensitivity to interpersonal incompatibility.

Adolescents also experience potentially severe adaptive consequences. As in younger children, increased impulse control problems and antisocial, aggressive behaviors are common due to the disruption of the family due to divorce (Stolberg, A.L. and Anker, J.M., "Cognitive and Behavior Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes," *Journal of Divorce*, Winter, 1983. Cf. Wallerstein, J.S. and Blakeslee, S., *Second Chances* (Ticknor & Fields, 1989) for the best recent study on the long term effects of divorce on both children and adults.

3. Gilder, G., *Men and Marriage* (Pelican, 1986).

4. Homosexual relationships are usually extremely short. As stated above, most homosexual exchange occurs between strangers, 70% admitting that they had had sex only once with over half of their partners. Homosexuals average somewhere between 20 and 106 different partners per year. The average homosexual has had 300 to 500 partners during a lifetime. Twenty-eight percent of homosexuals have had sodomy with 1000 or more partners, 70% with 50 or more partners, and only 2% have had what could be described as monogamous or semi-monogamous relationships. Cf. Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Allonantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50.

5. Only one-third of live-in couples marry. Cf. Craig, G.J., Human Development, 3rd ed. (Prentice-Hall, 1983), p. 420.

6. Diegmueller, K., "Extended Definition of Family Fuels Partnership Controversy," *Insight*, August 7, 1989, p. 19.

7. Regarding the New York Court of Appeals domestic partnership case in July 1989, Judge Vito J. Titone dismissed a narrowly construed definition of the family, writing, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." Diegmueller likewise relates, "In a New York case, a woman and her young son had moved from the South and boarded with a widower. Although no sexual relationship developed between the man and the woman, the three came to consider themselves a family; the boy eventually became the incapacitated widower's primary caretaker. When the old man died, his landlord tried to evict the younger man and his mother, even though they had lived in the apartment for 25 years. The tenants won the case, but the landlord is appealing" (p. 19).

8. Sullivan, A., "Here Comes the Groom," The New Republic, August 28, 1989, p. 20.

9. Diegmueller, K., p. 19.

10. "The divorce epidemic has not only devastated childhood, it has brought financial crisis to millions of women. Divorce reform was supposed to be a panacea for women trapped in bad marriages. Instead, it has trapped many of them in poverty. A widely respected study of one state's landmark no-fault divorce law found that the effect of the average divorce decree was to decrease the standard of living of the women and her minor children by 73 percent, while *increasing* the man's standard of living by 42 percent" ("The American Family Under Siege: An Analysis of Social Change Affecting the Family 1950-1990," Family Research Council, 1989.)

Two-parent families have a 7 percent poverty rate, as against 35 percent for those headed by women. Nearly three-quarters of all poor black families are headed by females. Nearly half of America's poor live in female-headed families with no husband present, even though such families in the general population are only 16 percent of the total. These families end up living on government welfare. Nearly 90 percent of AFDC children have able-bodied, but absent, fathers.

Butler and Kondratas write, "When the family is in bad shape, what follows is poor education, poor skills, and poor performance. The federal government may try to douse the flames, but the fire has already caught hold. As Secretary of Education, [now drug czar], William Bennett points out, of course, this does not mean 'society is relieved of responsibility to do what it can when the family cannot do or is not doing its job. . . . But society cannot replace the family' [Speech by William Bennett to the fourth annual meeting of Networking Community-Based Services, Washington, D.C., June 10, 1986].

From the standpoint of averting poverty, the ideal family is a healthy, two-parent family" (Butler, S. and Kondratas, A., *Out of the Poverty Trap* (Free Press, 1987), pp. 138-141.

11. Corey, L. and Holmes, K.K., "Sexual Transmission of Hepatitis A in Homosexual Men," *New England Journal of Medicine*, 1980, 302, pp. 435-438; Winkelstein, "Sexual Practices and Risk of Infection by the Human Immunodeficiency Virus," The San Francisco Men's Health Study, *Journal of American Medical Association*, 1987 (January 16), 257 (3), p. 323; Gebhard, P.H. and Johnson, A.B., *The Kinsey Data* (Saunders, 1979); Bell, A.P. and Weinberg, M.S., *Homosexualities* (Simon & Schuster, 1978); Manligit, G.M., and Talpaz, M., et. al., "Chronic Immune Stimulation by Sperm Allonantigens," *Journal of the American Medical Association*, 1984, 251 (2), pp. 237-241; U.S. Center for Disease Control Study (Atlanta, 1982) reported in Meredith, "The Gay Dilemma," *Psychology Today*, January 1984, p. 50; McKusick, L., et. al., "AIDS and Sexual Behavior Reported by Gay Men

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

JUNE 30 THROUGH OCTOBER 3, 1986

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
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BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–140. Argued March 31, 1986—Decided June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held: The Georgia statute is constitutional. Pp. 190–196.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Pp. 190–191.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Pp. 191–194.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. Pp. 194–195.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley* v. *Georgia*, 394 U. S. 557, distinguished. Pp. 195–196.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 196.

760 F. 2d 1202, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C *post*, p. 196, and POWELL, J., *post*, p. 197, filed concurring opini BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSH and STEVENS, JJ., joined, *post*, p. 199. STEVENS, J., filed a disser opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 214.

Michael E. Hobbs, Senior Assistant Attorney Genera Georgia, argued the cause for petitioner. With him on briefs were *Michael J. Bowers*, Attorney General, *pro Marion O. Gordon*, First Assistant Attorney General, *Daryl A. Robinson*, Senior Assistant Attorney General.

Laurence H. Tribe argued the cause for respon Hardwick. With him on the brief were *Kathleen M. S van* and *Kathleen L. Wilde.**

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respo ent) was charged with violating the Georgia statute cr

*Briefs of *amici curiae* urging reversal were filed for the Cat League for Religious and Civil Rights by *Steven Frederick McDowell* the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Fa Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John Whitehead, Thomas O. Kotouc*, and *Alfred Lindh;* and for David R son, Jr., *pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of York et al. by *Robert Abrams*, Attorney General of New York, *R Hermann*, Solicitor General, *Lawrence S. Kahn, Howard L. Zwi Charles R. Fraser*, and *Sanford M. Cohen*, Assistant Attorneys Gen and *John Van de Kamp*, Attorney General of California; for the Amer Jewish Congress by *Daniel D. Levenson, David Cohen*, and *Frede Mandel;* for the American Psychological Association et al. by *Marg Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub*, and bert Semmel; for the Association of the Bar of the City of New Yor *Steven A. Rosen;* for the National Organization for Women by *John S Katz;* and for the Presbyterian Church (U. S. A.) et al. by *Jeffre Bramlett.*

Briefs of *amici curiae* were filed for the Lesbian Rights Project e by *Mary C. Dunlap;* and for the National Gay Rights Advocates et al *Edward P. Errante, Leonard Graff*, and *Jay Kohorn.*

nalizing sodomy[1] by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U. S. 901 (1976).

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[1] Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ."

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. *Id.*, at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.*, at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F. 2d 1202, 1206-1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other

A divided panel of the Court of Appeals for the Elev Circuit reversed. 760 F. 2d 1202 (1985). The court held that, because *Doe* was distinguishable and in any e had been undermined by later decisions, our summary aff ance in that case did not require affirmance of the Dist Court. Relying on our decisions in *Griswold* v. *Connecti* 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. (1972); *Stanley* v. *Georgia*, 394 U. S. 557 (1969); and *Ro Wade*, 410 U. S. 113 (1973), the court went on to hold t the Georgia statute violated respondent's fundamental rig because his homosexual activity is a private and intimate sociation that is beyond the reach of state regulation by r son of the Ninth Amendment and the Due Process Clause the Fourteenth Amendment. The case was remanded trial, at which, to prevail, the State would have to prove t the statute is supported by a compelling interest and is most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at ju ments contrary to that of the Eleventh Circuit in this cas we granted the Attorney General's petition for certior questioning the holding that the sodomy statute violates t fundamental rights of homosexuals. We agree with pe tioner that the Court of Appeals erred, and hence reverse judgment.[4]

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[3] See *Baker* v. *Wade*, 769 F. 2d 289, rehearing denied, 774 F. 2d 12 (CA5 1985) (en banc); *Dronenburg* v. *Zech*, 239 U. S. App. D. C. 229, 74 F. 2d 1388, rehearing denied, 241 U. S. App. D. C. 262, 746 F. 2d 157 (1984).

[4] Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14 (1976); *Massachusetts Board of Retirement* v. *Murgia*

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), were described as dealing with child rearing and education; *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), with procreation; *Loving* v. *Virginia*, 388 U. S. 1 (1967), with marriage; *Griswold* v. *Connecticut*, *supra*, and *Eisenstadt* v. *Baird*, *supra*, with contraception; and *Roe* v. *Wade*, 410 U. S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey* v. *Population Services International*, *supra*, at 688–689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the

claimed constitutional right of homosexuals to engage in
of sodomy that is asserted in this case. No connectio
tween family, marriage, or procreation on the one han
homosexual activity on the other has been demonstr
either by the Court of Appeals or by respondent. More
any claim that these cases nevertheless stand for the pr
tion that any kind of private sexual conduct between co
ing adults is constitutionally insulated from state proscr
is unsupportable. Indeed, the Court's opinion in
twice asserted that the privacy right, which the *Griswo*
of cases found to be one of the protections provided
Due Process Clause, did not reach so far. 431 U. S., a
n. 5, 694, n. 17.

Precedent aside, however, respondent would have
nounce, as the Court of Appeals did, a fundamental ri
engage in homosexual sodomy. This we are quite unw
to do. It is true that despite the language of the Due
ess Clauses of the Fifth and Fourteenth Amendments,
appears to focus only on the processes by which life, li
or property is taken, the cases are legion in which
Clauses have been interpreted to have substantive co
subsuming rights that to a great extent are immune fro
eral or state regulation or proscription. Among such
are those recognizing rights that have little or no textu
port in the constitutional language. *Meyer*, *Princ*
Pierce fall in this category, as do the privacy case
Griswold to *Carey*.

Striving to assure itself and the public that anno
rights not readily identifiable in the Constitution's t
volves much more than the imposition of the Justice
choice of values on the States and the Federal Gover
the Court has sought to identify the nature of the
qualifying for heightened judicial protection. In *P*
Connecticut, 302 U. S. 319, 325, 326 (1937), it was sa
this category includes those fundamental liberties th
"implicit in the concept of ordered liberty," such that "

liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold* v. *Connecticut*, 381 U. S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights.[5] In 1868, when the Fourteenth Amendment was

[5] Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680–1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

ratified, all but 5 of the 37 States in the Union had crim sodomy laws.[6] In fact, until 1961,[7] all 50 States outla sodomy, and today, 24 States and the District of Colun

At the time of ratification of the Bill of Rights, North Carolina adopted the English statute of Henry VIII outlawing sodomy. See Co tion of the Statutes of the Parliament of England in Force in the Stat North-Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the C monwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts Laws of the Colony of Rhode Island and Providence Plantations 1647–1 p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (17

At the time of the ratification of the Bill of Rights, Virginia had no cific statute outlawing sodomy, but had adopted the English common 9 Hening's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

[6] Criminal sodomy statutes in effect in 1868:

Alabama: Ala. Rev. Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark. Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal. Gen. Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo. Rev. Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del. Rev. Stat., ch. 131, § 7 (1893).

Florida: Fla. Rev. Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga. Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw. Penal Code, ch. 13, § 11 (1869).

Illinois: Ill. Rev. Stat., div. 5, §§ 49, 50 (1845).

Kansas (Terr.): Kan. Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La. Rev. Stat., Crimes and Offences, § 5 (1856).

Maine: Me. Rev. Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland: 1 Md. Code, Art. 30, § 201 (1860).

Massachusetts: Mass. Gen. Stat., ch. 165, § 18 (1860).

Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn. Stat., ch. 96, § 13 (1859).

Mississippi: Miss. Rev. Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practi Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, § 47 (1866).

[Footnote 6 is continued on p. 191]

continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., *supra*, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudi-

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Nevada (Terr.): Nev. Comp. Laws, 1861–1900, Crimes and Punishments, § 45.

New Hampshire: N. H. Laws, Act. of June 19, 1812, § 5 (1815).

New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N. C. Rev. Code, ch. 34, § 6 (1855).

Oregon: Laws of Ore., Crimes—Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700–1903, p. 1011 (Purdon 1905).

Rhode Island: R. I. Gen. Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682–1716, p. 493 (1837).

Tennessee: Tenn. Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va. Code, ch. 149, § 12 (1868).

West Virginia: W. Va. Code, ch. 149, § 12 (1868).

Wisconsin (Terr.): Wis. Stat. § 14, p. 367 (1839).

[1] In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11–2, 11–3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, ¶¶ 11–2, 11–3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

ation of much of the substantive gloss that the Cour placed on the Due Process Clauses of the Fifth and teenth Amendments. There should be, therefore, gre sistance to expand the substantive reach of those Cl particularly if it requires redefining the category of deemed to be fundamental. Otherwise, the Judicia essarily takes to itself further authority to govern th try without express constitutional authority. The c right pressed on us today falls far short of overcomi resistance.

Respondent, however, asserts that the result should ferent where the homosexual conduct occurs in the pri the home. He relies on *Stanley* v. *Georgia*, 394 U. (1969), where the Court held that the First Amendme vents conviction for possessing and reading obscene m in the privacy of one's home: "If the First Amendment anything, it means that a State has no business telling sitting alone in his house, what books he may read c films he may watch." *Id.*, at 565.

Stanley did protect conduct that would not have be tected outside the home, and it partially prevented forcement of state obscenity laws; but the decision wa grounded in the First Amendment. The right presse us here has no similar support in the text of the Const and it does not qualify for recognition under the pr principles for construing the Fourteenth Amendmer limits are also difficult to discern. Plainly enough, ot illegal conduct is not always immunized whenever it o the home. Victimless crimes, such as the possession of illegal drugs, do not escape the law where they a mitted at home. *Stanley* itself recognized that its hol fered no protection for the possession in the home o firearms, or stolen goods. *Id.*, at 568, n. 11. An spondent's submission is limited to the voluntary sex duct between consenting adults, it would be difficult, by fiat, to limit the claimed right to homosexual

while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[8]

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante,* at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality

[8] Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

and the Western Christian Tradition 70–81 (1975). Du the English Reformation when powers of the ecclesias courts were transferred to the King's Courts, the first l lish statute criminalizing sodomy was passed. 25 Hen. V ch. 6. Blackstone described "the infamous *crime agains ture*" as an offense of "deeper malignity" than rape, a heir act "the very mention of which is a disgrace to human ture," and "a crime not fit to be named." 4 W. Blackst Commentaries *215. The common law of England, incluc its prohibition of sodomy, became the received law of Geo and the other Colonies. In 1816 the Georgia Legislat passed the statute at issue here, and that statute has b continuously in force in one form or another since that ti To hold that the act of homosexual sodomy is somehow p tected as a fundamental right would be to cast aside miller of moral teaching.

This is essentially not a question of personal "preferenc but rather of the legislative authority of the State. I nothing in the Constitution depriving a State of the power enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Co that there is no fundamental right—*i. e.*, no substantive ri under the Due Process Clause—such as that claimed by spondent Hardwick, and found to exist by the Court of A peals. This is not to suggest, however, that respondent m not be protected by the Eighth Amendment of the Constit tion. The Georgia statute at issue in this case, Ga. Co Ann. § 16–6–2 (1984), authorizes a court to imprison a perso for up to 20 years for a single private, consensual act of sod omy. In my view, a prison sentence for such conduct—cer tainly a sentence of long duration—would create a seriou Eighth Amendment issue. Under the Georgia statute a sin gle act of sodomy, even in the private setting of a home, is a

felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16–5–24, first-degree arson, § 16–7–60, and robbery, § 16–8–40.[1]

In this case, however, respondent has not been tried, much less convicted and sentenced.[2] Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

[1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A–6–65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13–1411, 13–1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41–1813 (1977) (1-year maximum); D. C. Code § 22–3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code Ann. § 16–6–2 (1984) (1 to 20 years); Idaho Code § 18–6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21–3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. § 14:89 (West 1986) (5-year maximum); Md. Ann. Code, Art. 27, §§ 553–554 (1982) (10-year maximum); Mich. Comp. Laws § 750.158 (1968) (15-year maximum); Minn. Stat. § 609.293 (1984) (1-year maximum); Miss. Code Ann. § 97–29–59 (1973) (10-year maximum); Mo. Rev. Stat. § 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. § 45–5–505 (1985) (10-year maximum); Nev. Rev. Stat. § 201.190 (1985) (6-year maximum); N. C. Gen. Stat. § 14–177 (1981) (10-year maximum); Okla. Stat., Tit. 21, § 886 (1981) (10-year maximum); R. I. Gen. Laws § 11–10–1 (1981) (7 to 20 years); S. C. Code § 16–15–120 (1985) (5-year maximum); Tenn. Code Ann. § 39–2–612 (1982) (5 to 15 years); Tex. Penal Code Ann. § 21.06 (1974) ($200 maximum fine); Utah Code Ann. § 76–5–403 (1978) (6-month maximum); Va. Code § 18.2–361 (1982) (5-year maximum).

[2] It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 191, than *Stanley* v. *Georgia*, 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States*, 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16–6–2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16–6–2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." *Ante*, at 190. But the fact that the moral judgments expressed by statutes like § 16–6–2 may be "'natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" *Roe* v. *Wade*, 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most inti-

mate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.'" *Herring* v. *State*, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," *ante*, at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante*, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16–6–2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16–6–2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.[1] I therefore see no basis for the

[1] Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code § 26–5901 (1933). In *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that § 26–5901 did not prohibit lesbian activity. And in *Riley* v. *Garrett*, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia Supreme Court held that § 26–5901 *did not prohibit* heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley*," Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167, n. 47 (1967).

Court's decision to treat this case as an "as applied" challenge to § 16–6–2, see *ante*, at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16–6–2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4–5; cf. 760 F. 2d 1202, 1205–1206 (CA11 1985). But his claim that § 16–6–2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16–6–2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante*, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold* v. *Connecticut*, 381 U. S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10–12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."

Bramlet v. *Wilson*, 495 F. 2d 714, 716 (CA8 1974); see *Parr* v. *Great Lakes Express Co.*, 484 F. 2d 767, 773 (CA7 1973); *Due* v. *Tallahassee Theatres, Inc.*, 333 F. 2d 630, 631 (CA5 1964); *United States* v. *Howell*, 318 F. 2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601–602 (1969); see also *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16–6–2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed.[2] The Court's cramped reading of the

[2] In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In *Powell* v. *Texas*, 392 U. S. 514 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.*, at 532. JUSTICE WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label 'condition.' In *Robinson* the Court dealt with 'a statute which makes the "status" of narcotic addiction a criminal offense . . . .' 370 U. S., at 666. By precluding criminal conviction for such a 'status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of 'condition' implicit in the opinion in *Robinson* . . . . The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" *Id.*, at 550–551, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8–11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey* v. *Population Services International*, 431 U. S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to § 16–6–2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16–6–2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, *e. g.*, *Rowland* v. *Mad River Local School District*, 470 U. S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).

issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat dis-

tinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make. *E. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E. g.*, *United States* v. *Karo*, 468 U. S. 705 (1984); *Payton* v. *New York*, 445 U. S. 573 (1980); *Rios* v. *United States*, 364 U. S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante*, at 190–191. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore* v. *East Cleveland*, 431 U. S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S., at 777, n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288–289 (1977). And so we protect the decision whether to

marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold* v. *Connecticut*, 381 U. S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore* v. *East Cleveland*, 431 U. S., at 500–506 (plurality opinion). The Court recognized in *Roberts*, 468 U. S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973); see also *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Roe* v. *Wade*, 410 U. S., at 153.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose

how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin* v. *Yoder*, 406 U. S. 205, 223–224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" *Katz* v. *United States*, 389 U. S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefeasible right of personal security, personal liberty and private property.'" *California* v. *Ciraolo*, 476 U. S. 207, 226 (1986) (POWELL, J., dissenting), quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

The Court's interpretation of the pivotal case of *Stanley* v. *Georgia*, 394 U. S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante*, at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> "'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> . . . . .
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U. S., at 564–565, quoting *Olmstead* v. *United States*, 277 U. S., at 478 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49 (1973), the Court suggested that reliance on the Fourth

Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" 413 U. S., at 66. "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," *ante*, at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16–6–2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.[3] In light of the state of the record, I see

[3] Even if a court faced with a challenge to § 16–6–2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16–6–2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, *e. g.*, Brief for Petitioner 36–37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23–28, on the one hand, with *People* v. *Onofre*, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11–14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19–27, on the other.

no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante*, at 195, to which *Stanley* refused to extend its protection. 394 U. S., at 568, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante*, at 195: drugs and weapons are inherently dangerous, see, *e. g.*, *McLaughlin* v. *United States*, 476 U. S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16–6–2 to be physically dangerous, either to the persons engaged in it or to others.[4]

[4] Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante*, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity

The core of petitioner's defense of § 16–6–2, however, is that respondent and others who engage in the conduct prohibited by § 16–6–2 interfere with Georgia's exercise of the "'right of the Nation and of the States to maintain a decent society,'" *Paris Adult Theatre I* v. *Slaton*, 413 U. S., at 59–60, quoting *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16–6–2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante*, at 190, 192–194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. See, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Loving* v. *Virginia*, 388 U. S. 1 (1967); *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[5] As Justice Jackson wrote so eloquently

is warranted. See Tr. of Oral Arg. 21–22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

[5]The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20–21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving* v. *Virginia*, O. T. 1966, No. 395, pp. 28–29, with *ante*, at 192–194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., at 6, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante*, at 193–194 (noting that 24 States and the District of Columbia have sodomy

for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 641–642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16–6–2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 429–453 (1961); *Stone* v. *Graham*, 449 U. S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16–6–2 represents a legitimate use of secular coercive power.[6] A State can no more punish private behavior be-

statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., at 7–12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*, at 12.

[6]The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense

cause of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).

Nor can § 16–6–2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U. S., at 68–69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning

was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. Stephen, A History of the Criminal Law of England 429–430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U. S., at 66, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965)).[7]

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond* v. *Charles*, 476 U. S. 54, 65–66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District* v. *Gobitis*, 310 U. S.

[7] At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16–6–2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10–11. The suggestion misses the point entirely. If the law is not invalid, then the police *can* invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), was precisely the possibility, and repugnancy, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.*, at 485–486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16–6–2 seems no less intrusive, or repugnant. Cf. *Winston* v. *Lee*, 470 U. S. 753 (1985); *Mary Beth G.* v. *City of Chicago*, 723 F. 2d 1263, 1274 (CA7 1983).

586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Like the statute that is challenged in this case,[1] the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.[2] Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law.[3]

[1] See Ga. Code Ann. § 16–6–2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[2] The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Ante*, at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra*. Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[3] See, *e. g.*, 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, . . . with burying alive"); 4 W. Blackstone, Commentaries *215

That condemnation was equally damning for heterosexual and homosexual sodomy.[4] Moreover, it provided no special exemption for married couples.[5] The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.[6] Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.[7] The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, *ante*, at 192–194,

(discussing "the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

[4] See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

[5] See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman—his wife, in which case, if she consent, she is an accomplice").

[6] The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, *e. g.*, *Comer* v. *State*, 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

[7] See *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939).

and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.[8]

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[9] Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972).

[8] A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

[9] See *Loving* v. *Virginia*, 388 U. S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); *id.*, at 288 (discussing crime of miscegenation).

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald* v. *Porter Memorial Hospital*, 523 F. 2d 716, 719–720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the

State—to decide.[10] The essential "liberty" that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold*, 381 U. S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U. S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16–6–2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary

[10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in *Griswold*.

associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Ante*, at 196. But the Georgia electorate has expressed no such belief—instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does the Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades.[11] The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representa-

[11] *Ante*, at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4–5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

tions about the importance of the State's selective application of its generally applicable law.[12]

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.[13]

I respectfully dissent.

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[12] It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey* v. *Population Services International*, 431 U. S. 678, 715, n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra*, the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

[13] Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part).

JAPAN WHALING ASSOCIATION ET AL. *v.* AMERICAN CETACEAN SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-954. Argued April 30, 1986—Decided June 30, 1986*

The International Convention for the Regulation of Whaling (ICRW) included a Schedule regulating whale harvesting practices of member nations (including the United States and Japan) and setting harvest limits for various whale species. It also established the International Whaling Commission (IWC) and authorized it to set harvest quotas. However, the IWC has no power to impose sanctions for quota violations, and any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit. Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress enacted the Pelly Amendment to the Fishermen's Protective Act of 1967, directing the Secretary of Commerce (Secretary) to certify to the President if nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of an international fishery conservation program. The President, in his discretion, may then direct the imposition of sanctions on the certified nation. Later, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, requiring expedition of the certification process and mandating that, if the Secretary certifies that nationals of a foreign country are conducting fishing operations in such a manner as to "diminish the effectiveness" of the ICRW, economic sanctions must be imposed by the Executive Branch against the offending nation. After the IWC established a zero quota for certain sperm whales and ordered a 5-year moratorium on commercial whaling to begin in 1985, Japan filed objections to both limitations and thus was not bound thereby. However, in 1984 Japan and the United States concluded an executive agreement whereby Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988, and the Secretary agreed that the United States would not certify Japan under either the Pelly Amendment or the Packwood Amendment if Japan complied with its pledges. Shortly before consum-

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*Together with No. 85-955, *Baldrige, Secretary of Commerce, et al.* v. *American Cetacean Society et al.*, also on certiorari to the same court.

able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-569. IN RE DISBARMENT OF CHRISTAKIS. It is ordered that Lee J. Christakis, of Gary, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-570. IN RE DISBARMENT OF PAYNE. It is ordered that K. Richard Payne, of Fort Wayne, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-571. IN RE DISBARMENT OF WILLIAMS. It is ordered that David F. Williams, of Springfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-573. IN RE DISBARMENT OF SHIELDS. It is ordered that William J. Shields, of Garfield Heights, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-574. IN RE DISBARMENT OF BRANNEN. It is ordered that Joseph Carchner Brannen, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-575. IN RE DISBARMENT OF SICKMEN. It is ordered that Russell T. Sickmen, of Hauppauge, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-576. IN RE DISBARMENT OF WEISS. It is ordered that Steven J. Weiss, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-577. IN RE DISBARMENT OF HARRISON. It is ordered that Charles Julian Harrison, of Towson, Md., be suspended from

the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 85-140. BOWERS, ATTORNEY GENERAL OF GEORGIA *v.* HARDWICK ET AL., *ante*, p. 186. Petition for rehearing denied.

SEPTEMBER 15, 1986

Dismissal Under Rule 53

No. 85-2122. HOPE ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 1245 ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 785 F. 2d 826.

SEPTEMBER 16, 1986

Miscellaneous Orders

No. A-205. RILES *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

No. A-213. MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* RILES. Application of the Attorney General of Texas for an order to vacate the stay of execution of sentence of death entered by the United States District Court for the Southern District of Texas, presented to JUSTICE WHITE, and by him referred to the Court, denied.

SEPTEMBER 17, 1986

Miscellaneous Order

No. A-207. RAULT *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE

ensure a proper balance between the interests of majority and minority shareholders.

Michael R. Rickman

BEHIND THE FACADE: UNDERSTANDING THE POTENTIAL EXTENSION OF THE CONSTITUTIONAL RIGHT TO PRIVACY TO HOMOSEXUAL CONDUCT

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plainsailing I can't navigate, I'm no voyager.[1]

Since the days of ancient Sodom, laws have proscribed homosexual conduct.[2] American prohibitions on sodomy are as old as American history itself.[3] These laws, whether based on religion,[4] medical understanding,[5] or "natural law,"[6] reflect society's disdain for homosexuality.

1. R. Bolt, *A Man for All Seasons*, act I at 147 (1967), *quoted in* Tennessee Valley Authority v. Hill, 98 S. Ct. 2279, 2303 (1978) by Chief Justice Burger.

2. The word "sodomy" comes from the Biblical city of Sodom, which, according to the Bible, God destroyed because of its citizens' evil practices. *Genesis* 19: 1-29. Judaic law specifically prohibited homosexual sodomy. The punishment for homosexual sodomy was death. *Leviticus* 20:13.

3. The Jamestown colony prohibited sodomy. *For the Colony in Virginia Britannia: Laws Divine, Moral, and Martial Etc.*, art. 9, at 12 (London 1612) (comp. by W. Strachery 1969) ("No man shall commit the horrible, and detestable sins of Sodomie upon pain of death; . . . .") The old English "buggery" statute of 1533, which made the "detestable and abominable Vice of Buggery" a capital crime, provided the historical roots of the Jamestown prohibition. 25 Hen. 8, ch. 6 (1533). After the Revolution, Virginia passed its own "buggery" statute, which retained the penalty of death. 1 S. SHEPARD, THE STATUTE AT LARGE OF VIRGINIA 1792 TO 1806 113 (1970). Most states followed Virginia's pattern. MUELLER, SEXUAL CONDUCT AND THE LAW 41 (2d ed. 1980).

4. The early Christian Church, relying in part on Old Testament prohibitions, believed that homosexuality was deviant and should be punished. *See Romans* 1: 26-27 ("men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men"); 1 *Corinthians* 6: 9-10 ("neither this immoral, nor idolaters, nor adulterers, nor homosexuals, nor thieves, nor the greedy, nor drunkards, nor revilers, nor robbers will inherit the kingdom of God"); *See also supra* note 2. *But see* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 117 (1980) (the New Testament takes no demonstrable position on homosexuality).

Thomas Aquinas cataloged homosexuality as a sin against God. He reasoned that God created men and women as sexual beings only for procreation. He considered sodomy a noncreative pleasure of the flesh, and therefore in conflict with man's spiritual destiny. 43 T. AQUINAS, *Summa Theologica* 246-249 (T. Gilby ed. 1968).

5. At one time, the American Psychiatric Association labeled homosexuality as a "mental disorder" and classified it as a "sexual deviation." In general, psychiatrists believed homosexuals were ill because they failed to conform to the prevailing cultural norms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) 38-39 (1952). Later, the association retained the "mental disorder," but categorized homosexuality under "personality disorders." A personality disorder is a deeply ingrained maladaptive pattern of behavior, but is

Recently, however, various groups have attempted to mobilize public support for changes in sodomy laws.[7] Although twenty-one states have decriminalized sodomy,[8] twenty-four have chosen[9] to retain their prohibitions.

Recently, advocates of the decriminalization of sodomy urged the Supreme Court to do what representative legislatures have refused to do—change laws prohibiting homosexual conduct.[10]

In *Bowers v. Hardwick*, however, the Court refused, over a strongly worded dissent by Justice Blackmun, to invalidate sodomy laws.[11] This Note analyzes the arguments in favor of an extension of the constitutional right to privacy to homosexual conduct and examines the governing role that the Supreme Court assumes when it invalidates laws on the basis of constitutional privacy. Part I examines the nature of our constitutional government. Part II analyzes the creation of the constitutional right to privacy and its articulated limitations. Part III examines three approaches offered by Justice Blackmun to extend privacy protection to homosexual conduct. Finally, after a brief description of recent legislative action, this Note concludes that an extension of constitutional privacy protection to homosexual conduct would be unprincipled and undemocratic judicial action.

I. THE MAJORITY-RULE PRINCIPLE.

The Constitution presupposes a system of representative government based on the principle of majority rule. During the birth of the Constitution, some expressed concern over the effect of majoritarianism on minority interests.[12] They feared that political issues would be decided "not according to the rules of justice and the rights of the minor party, but by

different from psychiatric and neurotic symptoms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-II) (1968) DSM III.

6. 4 BLACKSTONE'S COMMENTARIES 215 (Lewis's ed. 1897) (referring to sodomy as "the infamous crime against nature, committed with either man or beast . . . the very mention of which is a disgrace to human nature.").

The young American states copied Blackstone's language in their sodomy statutes, using such language as "unnatural" or crimes against nature. *See, e.g.*, Va. Code § 18.2-361 (1982):

> Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a Class 6 felony.

7. Homosexuals began to organize in 1961 following a riot outside a bar in New York's Greenwich Village. Police had beaten a man outside a bar frequented by homosexuals. Homosexuals adopted the term "gay," meaning celebration, for their movement. *See generally P. Simpson, From the Closet to the Courts* (1976).

8. The following states have decriminalized consensual sodomy between adult homosexuals: Alaska, 1978 Alaska Sess. Laws ch. 166 (effective Jan. 1, 1980); California, 1975 Cal. Stat., ch. 71, § 7 (effective July 1, 1976); Colorado, 1971 Colo. Sess. Laws, ch. 121, § (approved June 2, 1971); Connecticut, 1969 Conn. Pub. Acts. 828, § 214 (effective Oct. 1, 1971); Delaware, 58 Del. Laws, ch. 497, § 1 (effective Apr. 1, 1973); Hawaii, 1972 Hawaii Sess. Laws, act 9, § 1 (effective Jan. 1, 1983); Illinois, 1961 Ill. Laws, pt. 1983, § 11-2 (effective Jan. 1, 1962); Indiana, 1976 Ind. Acts. P.L. 148, § 24 (effective July 1, 1977); Iowa, Iowa Acts, ch. 1245, § 520 (effective Jan. 1, 1978); Maine, 1975 Me. Acts. ch. 499, § 5 (effective Mary. 1, 1976); Nebraska, 1977 Neb. Laws L.B. 38, § 328 (effective July 1, 1978); New Hampshire, 1978 N.H. Laws, 532: 26 (effective Nov. 1, 1973); New Jersey, 1978 N.J. Laws, ch. 95, § 2C:98-2 effective Sept. 1, 1979); New Mexico, 1975 N.M. Laws, ch. 109, § 8; North Dakota, 1977 N.D. Sess. Laws, ch. 122, § 1 (effective Mary. 19, 1977); Ohio, 1972 Ohio Laws, 134 v H 511, § 2 (effective Jan. 1, 1974); Oregon, 1971 Or. Laws, ch. 743, § 432 (167.040) (effective Jan. 1, 1972); South Dakota, 1976 S.D. Sess. Laws, ch. 158, § 22-8 (effective Apr. 1, 1977); Vermont, 1977 Vt. Acts, no. 51, § 3 (effective July 1, 1977); Washington, 1975 Wash. Laws, 1st esec. Sess., ch. 260 (effective July 1, 1976); West Virginia, 1976 W. Va. Acts, ch. 43 (effective June 11, 1976); Wyoming, 1977 Wyo. Sess. Laws, ch. 70, § 3 (effective May 27, 1977).

9. The following states prohibit various forms of private consensual sodomy. "Modern definition" statutes exclude the conduct of married couples. Alabama, Ala. Code § 13A-6-64 to -65 (1982) (modern definition); Arizona, Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1978 & Supp. 1983-84) (common law definition; "infamous crime against nature"); Arkansas, Ark. Stat. Ann. § 41-1813 (1977) (modern definition; homosexual acts only); District of Columbia, D.C. Code Ann. § 2203502 (Michie 1981) (modern definition); Florida, Fla. Stat. Ann. § 800.2 (West 1976) ("unnatural and lascivious acts"); Idaho, Idaho Code § 18-6605 (1979) (common law definition); Kansas, Dan. Stat. Ann. § 21-3505 (West Supp. 1984) (modern definition); Kentucky, Ky. Rev. Stat. § 510.100 (1975) (modern definition); Louisiana, La. Rev. Stat. Ann. § 14:89 (West 1974 & Supp. 1984) (modern definition); Maryland, Md. Ann. Code §§ 27-553, 27-554 (Michie 1982) ("sodomy" and "unnatural and perverted sex practices"); Massachusetts, Mass. Ann. Laws, ch. 272, §§ 34, 35 (West 1970) (common law definition); Michigan, Mich. Comp. Laws §§ 750.158, 750.338, 750.338a, 730.338b (2968) (common law definition); Minnesota, Minn. Stat. Ann. § 609.293-.294 (West Supp. 1984) (modern definition); Mississippi, Miss. Code Ann. § 97-29-59 (1973) (common law definition); Missouri, Mo. Ann. Stat. § 566.090 (Vernon 1979) (modern definition); Montana, Mont. Code Ann § 45-5-505 (1984) (deviate sexual conduct); Nevada, Nev. Rev. Stat. § 201.190 (1979) (homosexual acts only); North Carolina, N.C. Gen. Stat. § 24-177 (1981) (common law definition); Oklahoma, Okla. Stat. Ann. tit. 21, § 886 (West 1983) (common law definition); Rhode Island, R.I. Gen. Laws § 11-10-1 (1981) (common law definition); South Carolina, § C. Code Ann. § 16-15-120 (Law Coop. 1977) ("abominable crime of buggery"); Tennessee, Ten. Code Ann. § 39-2-612 (1982) (common law definition); Utah, Utah Code Ann. § 76-5-403, -406 (1978 & Supp. 1983) (modern definition); Wisconsin, Wis. Stat. Ann. § 944.17 (West 1982 & Supp. 1983-1984) (modern definition).

10. Georgia, Ga. Code Ann. § 16-6-2 (1982) (declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in Hardwick v. Bowers, 760 F.2d 1202 (1985)). New York, N.Y. Penal Law §§ 130.00, 130.38 (McKinney 1975) (criminal statute invalidated by the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476, 415 N.E.3d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)); Pennsylvania, 18 Pa. Cons. Stat. §§ 1301, 1324 (1973) (criminal statutes invalidated by the Pennsylvania Supreme Court in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980)); Texas, Tex. Penal Code Ann. tit. 5, § 21.06 (Vernon 1974) (held unconstitutional by the United States District Court for the Northern District of Texas in Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982)).

11. 54 U.S.L.W. 4919 (July 24, 1986).

12. THE FEDERALIST, No. 10, at 77 (J. Madison) (Am. Lib. Ed. 1961). Madison, for example,

the superior force of an interested and overbearing majority."[13] To protect against this danger, Madison urged adoption of the political structure contained in the proposed United States Constitution, a structure calculated to divide and disperse political power among and between various levels of government.[14] The Bill of Rights supplemented this sophisticated political protection by expressly protecting certain "rights of the minor party" against invasion by the majority.[15]

The majority-rule principle has operated as the centerpiece of American political freedom.[16] At its most fundamental level, the majority-rule principle creates a political environment where legal obligations reflect the values of a community.[17] By appealing to citizens' sense of fairness, the principle of majority rule contributes to political stability.[18] Majority rule also promotes consensus building and encourages pluralism by forcing minority factions to bind together to achieve wider public support.[19] "The majority," said Abraham Lincoln, "is the only true sovereign of a free people."[20]

Despite the political norm of majority rule and its accompanying bene-

feared the power of political factions united by some "common impulse of passion" which would ignore the "rights" of other citizens or the "aggregate interests" of the community. *Id.*

13. *Id.*

14. *Id.*

15. The Constitution did not originally contain the Bill of Rights. *Id.* at 529-50. In responding to arguments that a bill of rights should be included in the Constitution, Alexander Hamilton called such an addition unnecessary. He argued that the establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and the lack of titles of nobility were "greater securities to liberty and republicanism." Hamilton explained that the Constitution's list of specific powers limited the authority of the federal government, and that wise legislative discretion, regulated by public opinion, would adequately restrict the exercise of those powers. THE FEDERALIST, No. 84, at 510-515 (A. Hamilton) (Am. Lib. Ed. 1961).

16. The majority-rule principle is an indispensable ingredient in the daily functioning of government. Before a "bill" originating in either house of the United States Congress can become a "law," it must first be approved by a majority vote in both houses of Congress; without such approval, the bill cannot be presented to the President for his consideration. U.S. CONST. art. I, § 7, Cl. 2.

The veto power of the executive and the requirement that a bill be approved by both houses of Congress check the capacity of one house to enact a law by a simple majority vote of that house. U.S. CONST. art. I, § 7, Cl. 2.

17. Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 54 TEMP. L.Q. 226, 287-87 (1980). One commentator has suggested that there "exists a 'fundamental right' to have the majority rule principle as the operative norm in society." BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION 9 (1983).

18. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

19. *Id.*

20. 3 SANDBURG, ABRAHAM LINCOLN 132 (1942).

fits, the Constitution defines certain spheres in which our domestic society has agreed to be ruled undemocratically.[21] For example, short of a constitutional amendment, Americans cannot, however overwhelming the majority, establish a state religion. The Constitution's first amendment, as interpreted by an unelected Supreme Court, prohibits such action. "We the People" have articulated a value judgment in the Constitution—that church and state should be separate institutions.[22]

The Bill of Rights originally operated only to limit the power of the federal government. After the Civil War, however, Congress enacted the fourteenth amendment, in part, to increase constitutional authority of states.[23] The fourteenth amendment contains a "due process" clause that[24] courts originally interpreted in general terms to mean that government cannot harm citizens unless it follows certain procedures.[25]

In *Lochner v. New York*, however, the Supreme Court discovered a substantive component in the clause.[26] The court found, implicit in the word "liberty," certain unenumerated "fundamental" rights.[27] For thirty years, the Court employed this methodology, known as substantive due process, to strike down economic and social legislation that violated "fundamental" rights.[28] Eventually, the Court expressly repudiated substantive due process and, in fact, continues to do so.[29] *"Lochnerizing"* allowed the courts to protect what it perceived as "fundamental" rights, without textual or historical support from the Constitution.

A Supreme Court that makes rather than implements, fundamental

21. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

22. Admittedly, the Supreme Court faces far more difficult questions than this elementary hypothetical. Nonetheless, that conclusion does not invalidate the basic premise that the Constitution contains identifiable value choices which preclude legislative action.

23. *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

24. U.S. CONST. amend. XIV § 1, cl. 3.

25. J. ELY, DEMOCRACY AND DISTRUST 19 (1980).

26. 198 U.S. 45 (1905).

27. *Id.* at 48.

28. During the "Lochner era" the Court invalidated economic legislation which outlawed "yellow dog" contracts, Coppage v. Kansas, 236 U.S. 1 (1915); set minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525 (1923); and which prohibited the use of second-hand, unsterilized fabrics in the manufacture of bedding material, Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

29. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) ("the doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long been discarded").

value choices cannot be squared with Madisonian government.[30] Such action is neither inherently democratic nor constitutionally approved undemocratic decisionmaking. The Constitution—its history, structure, and language—is the beginning and the end of judicial responsibility.[31] In fact, in every opinion involving a constitutional question, the Supreme Court asserts that the Constitution compels the result.[32] The framers specifically rejected the idea that the Court should be a "Council of Revision" with the authority to alter legislative policy.[33] As a result, legislative judgments should stand, unless those judgments contravene a principle "fairly discoverable" in the Constitution.[34]

II. The Construction of the Constitutional Privacy Facade

The Constitution does not contain an express right to privacy. It does however, proscribe certain types of potentially intrusive government action.[35] The first proposal for creating a separate "right to privacy" emerged in 1890.[36] Samuel Warren and Louis Brandeis, fearing a dramatic increase in unauthorized publicity, urged courts to recognize a separate common law remedy for invasions of personal "privacy."[37] Viewing the development of "instantaneous photographs" and the newspaper enterprise as especially threatening to citizens' solitude, Warren and Brandeis urged courts to recognize a right "to be let alone."[38] Most courts, finding "privacy" adequately protected by other causes of action, balked at recognizing a separate right.

Seventy-five years later the United States Supreme Court discovered a separate, *constitutional* right to privacy.[39] The court, expressing grave fears about physical and figurative intrusions into marital solitude, held that states could not interfere with married couples' "private" use of contraceptives.[40] In 1972, the Court moved away from its concern for marriage and marital solitude, and found the right to privacy protects *individual decisions* to purchase contraceptives.[41] In 1973, the Court ruled that constitutional privacy also includes the "right to decide" to have an abortion.[42] Constitutional "privacy" therefore prevents states from prohibiting abortions, surgical procedures, performed in state-licensed hospitals and clinics, by state-licensed physicians.[43] In short, the Court's concern for "privacy" has moved from the solitude of the marital bedroom to decisions carried out in public hospitals.

Justice Blackmun, dissenting in *Bowers v. Hardwick*, argued that the constitutional right to privacy includes the right to engage in homosexual

30. Bork, *supra* note 21, at 6. Unless judicial decisions are based on principles "generally attributable to the Constitution," unfettered decisionmaking, "which enables courts to impose unacceptable values on the people," may result. Leede, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 540 (1983).

31. *Id.* at 8. ("The judge must stick close to the [Constitution's] text and the history, and their implications, and not construct new rights.") *See also* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) (the judicial responsibility is to determine the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text).

32. Bork, *supra* note 21, at 3-4.

33. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 435-38 (1865). During the constitutional convention, some delegates argued that the judicial branch should be a "Council of Revision," a third legislative chamber with revisionary power over all legislation it deemed "improper." In effect, the Council of Revision would have given judges not only control over constitutional questions, but also control over legislative policy. The Convention rejected this concept of judicial authority. *Id.*

34. *See* J. ELY, *supra* note 25, at 2 (1980).

35. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 929 n.3 (reference to privacy in the Bill of Rights pertains to ways in which the government can go about collecting information). Under the third amendment, the federal government cannot forcibly quarter soldiers in civilian homes in peacetime. *U.S. Const.* amend. III. The fourth amendment prohibits the federal government from conducting "unreasonable searches and seizures" against citizens' "persons, houses, papers and effects." *U.S. Const.* amend. IV. The fifth amendment prohibits compulsory confessions in criminal trials. *U.S. Const.* amend. V. Far from granting a general right to privacy, however, these amendments govern activity in limited certain spheres. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 3 (1965).

36. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

37. *Id.* at 195. More specifically, Warren and Brandeis feared an increase in the "unauthorized circulation of portraits of private persons," a press "overstepping in every direction the obvious bounds of propriety and decency," and the publishing of "unseemly gossip" which had resulted in the "lowering of social standards and morality." *Id.*

38. *Id.* at 193. This phrase originated in COOLEY, TORTS 29 (2d ed. 1888). According to Cooley: "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley characterized the corresponding duty as, "not to inflict an injury and not, within such proximity as might render it successful, to attempt the infliction of an injury." *Id.*

39. Griswold v. Connecticut, 381 U.S. 479 (1965).

40. *Id.*

41. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972).

42. Roe v. Wade, 410 U.S. 113, 154 (1973).

43. After *Roe*, the Supreme Court invalidated a number of state enactments on the basis of violations of "privacy." *See, e.g.*, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 75 (1976) (striking down a parental consent requirement for abortions performed on minors). The Court also held that constitutional privacy not only prevents the states from interfering with the abortion decision, but also prohibits the spouse from "interfering" as well. 428 U.S. at 69 (states may not constitutionally require spousal consent for an abortion). In addition, the *Danforth* Court struck down a provision which prohibited a particular abortion procedure, despite extensive lower court and legislative findings that the procedure was dangerous. 428 U.S. at 95-99 (White, J., dissenting in part and concurring in part).

sodomy.[44] The Constitution, according to Justice Blackmun, prohibits states from interfering with "intimate behavior" that does not take place in public.[45]

Justice Blackmun offered three general bases for his conclusion: first, the constitutionalization of John Stuart Mill's principle of liberty;[46] second, a judicial ban on legislating "private morality;"[47] and, finally, implicit constitutional values protecting intimate relationships.[48] Adoption of these principles, however, would invade the province of legislative decisionmaking and allow the Court to impose its values on a reluctant public.

III. Justice Blackmun's Bases for Expanding the Right to Privacy

A. *The Constitutionalization of John Stuart Mill's Principle of Liberty*

The dissenters in *Bowers* would have the Court constitutionalize the contemporary version of John Stuart Mill's libertarian principle of liberty. Mill proposed that governments could only regulate individual behavior that "harms others."[49] Justice Blackmun wrote that nothing justified the conclusion that homosexuality is "physically dangerous, either to the persons engaged in it or to others."[50] In short, the dissenters would have held that states cannot, consistent with the Constitution, regulate behavior unless it is harmful.

This constitutionalization of Mill's principle would transfer to the judiciary the broad responsibility of determining whether individual behavior constitutes sufficient harm to warrant legal prohibition. When the *Bowers* dissenters concluded that "private" homosexuality is not harmful, they ignored two critical questions, namely, what is a "sufficient harm" and who should decide what is harmful. The dissenters, by concluding that homosexual conduct is not harmful, either meant that homosexuality is completely without social effects, or that the effects are not "harmful" enough to justify legal sanction. The former conclusion is absurd, the latter a determination only for an elected legislature.

Homosexuality clearly "affects" society. "Homosexuality," according to one commentator, is a "continuous aspect of personality or personhood that usually requires expression across the public/private spectrum."[51] As one author observed, the gay experience "provides an opportunity to question traditional lifestyles and values and create an individual lifestyle based on personal knowledge and clarified social values."[52] Legal recognition of an alternative "lifestyle," by definition, affects the character of society.

The question of what constitutes sufficient justification for legal prohibition is a question for the legislature. To begin with, the constitutionalization of Mill's principle confuses political philosophy with constitutional principles. Legislators may vote against a mandatory motorcycle helmet law based on a personal belief that the legislation is an unjust interference with personal autonomy. The Constitution, however, does not compel the same result.[53] The Constitution[54] allows states to enact even paternalistic laws to protect the "health, safety, morals, and general welfare" of their citizens.[55] Constitutionalization of Mill's principle would call into question the validity of numerous statutes commonly thought to be within states' police power, including compulsory

44. 54 U.S.L.W. at 4924-25.

45. *Id.* at 4926-27. ("[T]he mere fact that intimate behavior may be punished when it takes place in public cannot dictate [state regulation of] intimate behavior that occurs in intimate places.")

46. *Id.* at 4925-26.

47. *Id.* at 4926.

48. *Id.* at 4924-25.

49. J.S. Mill, On Liberty 13 (Lib. Arts Ed. 1956). To his basic proposition, Mill added the corollary that government should not enact purely "paternalistic" laws. Mills sought to articulate one basic principle that could "govern absolutely" the extent to which society could control individuals. *Id.*

50. 54 U.S.L.W. at 4925-26.

51. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285, 1890 (1985).

52. Nunguesser, Homosexual Acts, Actors, and Identities viii.

53. *See, e.g.*, Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377, *cert. denied*, 395 U.S. 709 (1969). *See also* Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 Ohio St. L.J. 355 (1969). Comment, *Society's Right to Protect an Individual from Himself*, 2 Conn. L. Rev. 150 (1969). *See generally* Comment, *States' Power to Require an Individual to Protect Himself*, 26 Wash. & Lee L. Rev. 112 1969).

54. The Constitution provides: "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Supreme Court has acknowledged the broad powers left to the states. In Gibbons v. Ogden, 9 Wheat 1, 6 L.Ed. 23 (1824) Chief Justice John Marshall explained that residual state powers include "an immense mass of legislation which embraces everything within the territory of a State." *Id.* at 72.

55. Berman v. Parker, 348 U.S. 26, 32 (1954). The Court identified public safety, public health, morality, peace and quiet, and law and order as some of the more conspicuous examples of states' police power. The Court also explained that the legislature, not the judiciary is the main guardian of the public's needs. *Id.*

seat belt laws, compulsory physical and mental treatment, and prohibitions on the use of allegedly harmful substances.

More importantly, legislatures should determine whether certain behavior harms society because the question of what constitutes "harm" often involves moral judgments about empirical evidence. A conclusion that homosexual conduct justifies prohibition of criminal penalties involves especially difficult value judgments about the empirical evidence on the social effects of homosexuality. First, the exact cause and character of homosexuality is unknown. Psychiatrists do not agree whether homosexuality, properly understood, is a lifestyle, a preference, an illness, a sociopolitical movement or a biological predisposition.[56] Moreover, any medical judgment declaring the exact pathological status of homosexuality is most likely already politicized.[57]

Second, social theorists have long studied the repression of certain sexual behaviors and disagreed over its significance and effects. Freud, for example, theorized that communal life depends on sexual repression.[58] Western societies, according to Freud, sought to divert energy from sexual activity to social uses such as work.[59] Restricting sexual gratification to heterosexual, genital, monagamous sex, although a "serious injustice" to those desiring alternate sexual gratification, also stabilized society by creating de-sexualized social ties.[60] These bonds are necessary, according to Freud, to dampen man's inherent aggressiveness towards other members of society.[61]

Other social theorists have concluded that capitalism is especially dependent on the repression of sexual excesses, such as homosexuality.[62] Max Weber located the creation of capitalism in the coming of Protestant religion and its accompanying prohibitions on certain types of sexual expression.[63] Protestantism infused work with religious significance, and strove to deflect persons' energy from erotic tendencies.[64] This sexual repression repudiated all nonprocreative "idolatry of the flesh."[65] Daniel Bell has recently described the clash between a productive economy and a polity dependent upon work on the one hand, and a consumptive economic culture stressing hedonism on the other.[66] Joseph Schumpeter has predicted difficulty in sustaining capitalism in a culture of rootless and childless apartment dwellers.[67]

Finally, the recent appearance of the disease AIDS (Acquired Immune Deficiency Syndrome), which vividly shows that homosexuality is not without social or individual costs, complicates any analysis of the effects of homosexuality.[68] AIDS is a deadly disease with no known cure.[69] The spread of the disease is epidemic, as the number of reported cases doubles every six months.[70] Anyone may contract the disease,[71] but the overwhelming majority of cases involve men who have engaged in homosexual conduct.[72] Given the high incidence of the disease among homosexuals, some commentators have proposed stricter prohibitions on sodomy as a means to control the disease.[73]

56. *See generally* MEYER, EGO-DYSTONIC HOMOSEXUALITY, IN COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1056 (H. Kaplan & B. Saddock, 4th ed. 1985) (a firm pathological understanding of homosexuality is marked by a fundamental lack of consensus).

57. R. BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981) ("A furious egalitarianism [compels] psychiatric experts to negotiate the pathological status of homosexuality with homosexuals themselves.").

58. S. FREUD, CIVILIZATION AND ITS DISCONTENTS 51 (J. Strachey trans. 1961). Freud observed, for example, that the continuation of family life depended on a prohibition of incest. Freud called this prohibition "the most dramatic mutilation of man's erotic life." *Id*

59. *Id.*

60. *Id.*

61. *Id.* at 56.

62. Emile Durkheim contended that society could not be maintained unless some of humankind's strongest inclinations—"the obscure, mysterious, forbidding character of the sexual act"—were controlled. LUKE, EMILE DURKHEIM, HIS LIFE AND WORK, A HISTORICAL AND CRITICAL SURVEY 533 (1972).

63. M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 166-67 (T. Parsons trans. 1930).

64. *Id.*

65. *Id.* at 169.

66. D. BELL, THE CULTURAL CONTRADICTION OF CAPITALISM 71-72 (1976).

67. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY chs. XI-XIV (1950).

68. *See generally* Note, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315 (1984). Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, GOLD. GATE U. L. REV. 301 (1985).

69. Landesman and Vieira, *Acquired Immune Deficiency Syndrome (AIDS): A Review*, 143 ARCH. INTERNAL MED. 2307 (1983). Seventy percent of patients diagnosed before January, 1983 have died. Over 72% of the victims were male homosexuals, especially those with multiple sexual partners. 33 CENTERS FOR DISEASE CONTROL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *Morbidity and Mortality Weekly Report (MMWR) Update: Acquired Immune Deficiency Syndrome (AIDS)—United States*, No. 47 (Nov. 30, 1984).

70. Flaherty, *A Legal Emergency Brewing Over AIDS*, 6 NAT'L L.J. 44 (July 9, 1984).

71. Landesman and Vieira, *supra* note 69, at 2308.

72. Selik, *Haverkos and Curran, Acquired Immune Deficiency Syndrome (AIDS): Trends in the U.S., 1978-1982*, 76 AM. J. MED. 394 (1984). Men who have had homosexual contact constitute 70% of reported cases. *Id.* at 499. The high level of promiscuity among homosexuals compounds the problem. Jaffe, Choi, and Thomas et al., *National Case Control Study of Kkapsoi's Sarcoma and Pneumocystis Canini in Homosexual Males, Part I and II*, 99 ANNALS INTERNAL MED. 145 (1933) (the control group averaged 25 partners per year while bathhouse customers averaged 65 sexual partners per year).

73. *See, e.g.*, Robinson, *quoted in* Bar Ass'n for Human Rights of Greater New York, Les-

Representative legislatures, not unelected judges, should evaluate the evidence on the effects of homosexual conduct and decide whether prohibitions are justified.[74] Judicial imposition of Mill's principle would improperly redistribute the constitutional authority to determine what constitutes prohibitable conduct from the legislatures to an unelected judiciary.

B. *A Judicial Ban on Legislating Morality*

Another principle offered by the dissenters in *Bowers* to expand the Court's privacy protection characterizes the right to privacy as a judicial ban on states' legislating private morality. Justice Blackmun criticized the majority for failing to see a constitutional difference between "public sensibilities" and "private morality."[75]

The general assertion that the Supreme Court has, or can, prohibit states from legislating morality represents a misunderstanding of the nature of law, morality, and the relationship between the two. Law frequently reflects social norms, or "morals." Most law is moral legislation insofar as it conditions actions and thoughts in conformity with those social norms.[76] States enact laws and implement policies that proscribe,

BIAN/GAY LAW NOTES 1 (Jan. 1986). Professor Robinson suggests that: "the only rational means of responding to this extraordinary tragedy [of AIDS] is to change our behavior. The behavior believed to have infected about three fourths of the victims is sodomy. . . ." He argues that states should be allowed to enact sodomy statutes to restrict "potentially lethal behavior" and to close bathhouses and bars where "promiscuous, extraordinarily risky sexual activity takes place." *Id. See also* Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645, 650 n.41 (1985). "As the incidence of AIDS increases in the homosexual community and as bisexual members of that community carry the disease to the population at large, the enforcement of sodomy statutes may become a primary alternative in the containment of this disease." *Id.*

74. The debate over the American Law Institute's proposed Model Penal Code illustrates the appropriate forum for discussing whether to prohibit homosexual conduct. The ALI opposed the criminalization of homosexual conduct because it did not involve force, adult corruption of minors, or offenses committed in public. The drafters, acknowledging Mill's principle, concluded that communities were not harmed by atypical sex practices that occurred in seclusion between consenting adults. This proposal set off a furious debate. Some argued that the "suppression of vice" is necessary because violation of society's moral structure undermines the "very basis" of that society. On the other hand, proponents of decriminalization adhering to Mill's principle, argued that regulation was unjustified because such conduct, which they perceived as "private," did not harm society. In the end, state legislatures decided to accept or reject the ALI report. MODEL PENAL CODE § 207.5 commentary at 277 (Tent. Draft No. 4, 1955).

75. 54 U.S.L.W. at 4926.

76. G. WILL, STATECRAFT AS SOULCRAFT 19-20 (1985). *See also* R. POUND, THE PHILOSOPHY OF LAW 71 (1922). Law is "a system of ordering human conduct and adjusting human relations beyond merely individual feelings or desires." *Id.*

mandate, regulate, and subsidize individual behavior that will, over time, nurture, bolster, or alter habits, dispositions, and values on a public scale.[77]

The Constitution, the dissenters in *Bowers* nonetheless argued, prohibits states from regulating "private," as opposed to public, morality. Such a distinction, however, does not exist. Morals regulate conduct, commanding individuals to engage in or refrain from certain behavior. This behavior, even if based on "personal" desires, is inherently "public."[78] The moral virtue of courage, for example although based in the personal quality of fearlessness, manifests itself in "public" behavior conditioned on this quality. Similarly, while the source of homosexuality is a "personal" desire to engage in sex with a person of the same gender, homosexuality manifests itself in the "public" behavior of expressing a desire for and engaging in sex with other persons. All private morals, therefore, are also public morals.[79] "Morals" exist only within the awareness of other members of society; they mean nothing to a person in isolation.

Dividing morality into two categories, the morality of aspiration and the morality of duty, provides a more useful model for understanding the relationship between law and morality.[80] The morality of aspiration is "the morality of the Good Life, of Excellence, or the fullest realization of human powers."[81] When a man fails to achieve all that to which he "aspires" he is merely guilty of a shortcoming, but not of wrongdoing.

77. G. WILL, *supra* note 76, at 20.

78. KELSEN, PURE THEORY OF LAW 59-60 (1978).

> The social character of morals is sometimes called into question by pointing to those moral norms that prescribe a behavior not toward other individuals but toward oneself—such as the norms that prohibit suicide or prescribe courage or chastity. The behavior of the individual, which these norms prescribe, refers directly—it is true—only to this individual; but indirectly to other members of the community. For this behavior becomes the object of a moral norm in the consciousness of the community, only because of its consequences on the community. Even the so-called obligations toward oneself are social obligations. They would be meaningless for an individual living in isolation.

Id.

79. *Id.* The fallacy of the private/public distinction is also apparent in the context of abortion rights:

> The law can treat abortions as private transactions between women and their doctors. The law cannot, however, make the consequences—1.7 million abortions a year; a new casualness about the conceiving and disposing of life; transformed attitudes about sex, relations between sexes, and the claims of family and children—the law cannot make those "private" consequences.

G. WILL, *supra* note 76, at 87. Decisions to abort fetuses thus become part of the social consciousness of the community and of its social norms.

80. *See generally* FULLER, THE MORALITY OF LAW 5 (1964).

81. *Id.* at 6.

The morality of duty, on the other hand, lays down the basic rules without which an ordered society is impossible. The morality of duty, therefore, condemns citizens for failing to respect the basic requirements of social living.[82]

Society determines when to turn moral obligations into legal obligations. The law cannot force all citizens to lead "perfect" lives,[83] but legislatures routinely use legal sanctions to "heighten" the moral aspirations of individuals.[84] When legislatures take such measures diverse political interests can battle over the point at which legal pressure should end and the challenge of personal excellence begins.[85]

In some cases, the Constitution prohibits legislatures from imposing majoritarian morality on citizens. For example, suppose a state decides to expand its road system to increase economic activity in a poverty-stricken region of the state. The state cannot force citizens to donate land, without compensation, for an interstate highway. Such forced benevolence would violate the "taking clause" of the fifth amendment.[86] The judiciary must intervene and enforce a constitutionally predetermined value judgment.[87]

A state's decision to prohibit sodomy, however, does not violate any

82. *Id.*

83. *Id.* at 9. Fuller wrote, "There is no way to compel a man to live up to the excellence of which he is capable." As an example, Fuller states that society cannot compel citizens to live lives of reason. *Id.*

84. In the 1960s for example, Congress enacted civil rights legislation, primarily to improve the condition of black Americans. Congress also sought, however, to change the "immoral" racial attitudes of many white Americans. Congress accomplished its goals by forcing races to eat, live, and study together. Desegregation and the civil rights laws explicitly and successfully changed individuals' moral beliefs by compelling them to change their behavior. Congress improved society by integrating the races, and also heightened the moral aspirations of citizens by effectuating a change in moral attitudes. *See Selections from Hearings before Senate Commerce Committees in July and August of 1963*, in GUNTHER, CONSTITUTIONAL LAW 159-162 (11th ed. 1985).

85. FULLER, *supra* note 80, at 10; G. WILL, *supra* note 76, at 87. *See also* Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 559 (1985).

Political philosophers have long disagreed over the appropriate role of government in encouraging citizens to lead "Good" lives. Edmund Burke, for example, argued that "the principles of true politics are those of morality enlarged." 1 BURKE, CORRESPONDENCE 332 (William ed. 1944). Bertrand Russel, however, condemned a high level of government interference in moral issues. B. RUSSEL, MARRIAGE AND MORALS 291 (1929).

86. "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

87. *See* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). Ironically, at the same time the Supreme Court is restricting the authority of states to make certain social judgments, the Court is expanding the authority of the states concerning certain economic matters. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 227 (1984) (The public purpose of breaking up land oligarchies satisfied the "public use" requirement for governmental takings, even though the land ended up in private hands.).

constitutional limitation on majoritarian morality. Sodomy laws, at the very least, manifest society's displeasure with homosexual conduct and reinforce social values.[88] The law provides citizens with the moral gratification of living in a state which prohibits behavior they feel is morally wrong. The Constitution is silent on the question of the social propriety of homosexuality, and therefore the Court has no mandate to intervene. No principle identifiable in the text or history of the Constitution makes homosexuals' sexual gratification more important than other citizens' moral gratification.[89]

Constitutional protection of conduct that society deems morally deficient undermines the capacity of the majority to achieve the levels of moral excellence to which it aspires.[90] The moral choices of citizens, made through their elected representatives, should make or change laws.[91] Where the Constitution is silent, unelected judges have no mandate to impose their moral preferences upon a people who have made a different moral assessment.[92]

88. RADZINOWICZ, SIR JAMES FITZJAMES STEPHEN AND HIS CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW 229-30 (1957). "The sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a judgment what otherwise might be a transcient sentiment." *Id. See also* Buchanan, *supra* note 87, at 559 ("It is hard to condemn what the law permits").

89. Bork, *supra* note 21, at 10. Bork explains that absent a moral or ethical principle embodied in the Constitution, community judgments must stand. *Id.*

90. Buchanan, *supra* note 85, at 559.

91. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (A judge "is not a knight errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles.") *See also* Dronenberg v. Zeck, 741 F.2d at 1397. (Bork, J.). "If the revolution in sexual mores . . . is in fact ever to arrive, . . . it must arrive through the moral choices of the people and their elected representatives, not through the ukase of [a] court." *Id.* The danger of equating the courts' perceived moral superiority with its legal power is that the "morally superior judge" will be one who imposes a set of "authoritarian ethics" on an unconsenting public. Leede, *supra* note 30, at 549.

92. Plato proposed a political system ruled by "philosopher kings." These rules, according to Plato's plan, would make wiser decisions that those made by a majority in a representative form of government. Plato contended that it is possible to device a political system that would generate a continuing procession of philosopher kings as rules. THE REPUBLIC OF PLATO 205-11 (F. Cornford ed. 1961).

Judge Learned Hand once observed: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958). *See also* Bork, *Judge Bork Replies*, 1984 A.B.A. J. 132 (explaining his 1971 article, Bork, *supra* note 21).

C. *Extra-Constitutional "Traditions" as the Basis for Overturning Legislative Judgments Jurisprudence*

The *Bowers* dissenters would also have applied an elastic form of "tradition-based" jurisprudence. Justice Blackmun, relying heavily on an article written by Professor Karst, attempted to identify an individual freedom to choose the "form and nature" of "intensely personal bonds."[93] Justice Blackmun rooted this freedom in what he perceived as the nation's values.[94]

In general, tradition-based jurisprudence, unattached to constitutional guidelines, is inconsistent with Madisonian government. Tradition-based jurisprudence allows a judge to arrive at almost any conclusion that he is predisposed to make.[95] Because no finite set of indicia exists to define what are "traditions," judges decide the content of controlling traditions.[96] Moreover, if a judge can arbitrarily choose which indicia of tradition to use, or if a judge simply cannot identify controlling "traditions,"[97] his own values, and not the Constitution, guide his decisionmaking.

Even assuming that judges can identify traditions, such jurisprudence is inherently undemocratic. It is hard to square the theory of our government with the notion that yesterday's majority (assuming it was a majority) should control today's.[98]

Professor Karst, advocates extending privacy protection to certain "intimate associations."[99] He defines an intimate association as "a close and

93. 54 U.S.L.W. at 4924.

94. 54 U.S.L.W. at 4927.

95. *See generally* Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39-43 (1978) [hereinafter cited as Ely, *Discovering Fundamental Values*].

96. *See* Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306, 1320 (1975) ("Assuming that society does have a fundamental commitment to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples; what specific conclusions follow. Certainly those same standards could and have permitted the exclusion of Negroes from juries.") *See also* Betts. v. Brady, 316 U.S. 455 (1942) (the majority and dissenting opinions reached opposite conclusions on whether American traditions required the appointment of counsel for those who could not afford it).

97. Ely, *Discovering Fundamental Values*, *supra* note 94, at 39 (1978) (noting the "tremendous uncertainties in ascertaining anything very concrete" about past intellectual or moral climates.").

98. *Id.* at 42.

99. Karst, *The Freedom of Association*, 89 YALE L.J. 624 (1983). Professor Tribe reaches the same result by defining tradition in such meaningless terms that it will apply to almost anything. Tribe admits that the history of homosexuality is one of "disapproval and disgrace," but circumvents the obstacle by proposing to raise the definition of tradition to a higher "level of generality." This permits, according to Tribe, "unconventional variants" to claim the same constitutional protection as "mainstream versions" of conduct. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13, at 944-946 (1978). Through semantic gymnastics he arrives at the bizarre conclusion that what is "traditional" includes what is "unconventional."

familiar personal relationship that is in some significant way comparable to a marriage or family relationship."[100] To determine whether an "intimate association" is entitled to constitutional protection, Karst relies on four values: society,[101] caring and commitment,[102] self-identification,[103] and intimacy.[104] These values come from a "sense of collectivity," the "shared sense that 'we' exist beyond 'you' and 'me'."[105] Karst finds these values present in a homosexual relationship and concludes that the Constitution protects the act of sodomy from criminal penalties.[106]

Simply stated, "the shared sense that 'we' exist beyond 'you' and 'me' " is a principle based on a value preference rather than on a principle identifiable in the history, language, or structure of the Constitution. Notwithstanding Karst's elaborate collection of historical references to certain values, the simple fact is that twenty-four state legislatures continue to make the value judgment that sodomy is a crime.[107] Professor Karst's conglomeration of vague values does not justify judicial nullification of those legislative judgments.

IV. THE RECENT POLITICAL RESPONSE TO SODOMY STATUTES

Illinois, in 1962, decriminalized private sexual conduct between adult homosexuals.[108] Since 1979, twenty-five states have decriminalized homosexual conduct.[109] Whether due to improved medical understanding, the sexual revolution, or political pressure from gay rights activists, legislatures have responded to political pressure. In 1980 and 1984, for example, the Democratic Party included a gay rights plank in its national

100. *Id.* at 630. Karst defines society as the opportunity to enjoy the company of certain people, an "expectation of access" to another person's physical presence. *Id.*

101. *Id.* at 632. "Caring and commitment," according to Karst, is the chief value. In essence, "caring and commitment" is living and being loved. *Id.*

102. *Id.* at 634. Self-identification is the formation and shaping of an individual's identity. Associations, Karst asserts, profoundly affect our personalities and senses of self. *Id.*

103. *Id.* Intimacy is the context of caring which makes the sharing of personal information significant. *Id.*

104. *Id.* at 630.

105. *Id.* at 682.

106. *See supra* note 9.

107. *See supra* note 8.

108. *Id.*

109. *See supra* note 9 accompanying text.

platform. In fact, homosexuals enjoy political dominance in certain regions of the country. At the same time, twenty-four states and the District of Columbia have chosen to retain laws which prohibit some form of sexual contact between persons of the same sex. These states, for whatever reasons, continue to prefer a society in which sodomy is prohibited. The mere reluctance of states to change, however, is not a constitutional mandate for judicial intervention.

V. CONCLUSION

Justice Blackmun's dissent in *Hardwick*, if followed, would reaffirm *Lochner* in American jurisprudence behind the facade of protecting privacy. Statutes that currently prohibit homosexual conduct reflect societal value judgments concerning the propriety of a particular form of behavior. Absent a conflicting constitutional value the majority-rule principle allows such determinations to govern. The Supreme Court's only role is to invalidate legislative acts which contravene principles embodied in that Constitution. Nullifying sodomy statutes, on the basis of a "fundamental" right to privacy, would unprincipledly and undemocratically replace centuries-old values with those of an unelected Court.[110]

Alan J. Wertjes

110. F. Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 58 (1931). Frankfurter wrote:

> The veto power of the Supreme Court over the socioeconomic legislation of the states, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The *most destructive*, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely the tests of trial and error. The *least responsible*, because it often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual justices, in matters of fact and opinion not peculiarly within the competence of the judges behind the impersonal authority of the Constitution.

Id. (emphasis added).

JUSTICE MARSHALL AND EQUAL PROTECTION REVIEW: A SPECTRUM OF STANDARDS?

For nearly a century from the ratification of the fourteenth amendment until the Warren Court era, the equal protection clause played a minor role in the Supreme Court's jurisprudence.[1] The Court narrowly interpreted the clause to serve the primary purpose of its drafters[2] and largely restricted its use to cases involving racially discriminatory legislation.[3]

Today equal protection is a powerful and frequently invoked, yet confused, constitutional doctrine. Depending upon the class of persons or nature of the interests affected by the challenged legislation, the Court has employed one of two purportedly distinct standards of review, rational basis or strict scrutiny. Because two-tiered scrutiny has often proved a blunt instrument the Court has developed a number of analytic techniques to sharpen rational basis scrutiny and to dull strict scrutiny.[4] In addition, the Court now acknowledges a third standard of review.[5]

1. Substantive due process analysis overshadowed the role of equal protection analysis during this period. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (New York law limiting working hours of bakery employees held to violate 14th Amendment liberty of contract). In addition to employing substantive due process analysis, the Court also affirmatively rejected equal protection challenges during this era. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 208 (J. Holmes) (labelling equal protection "the usual last resort of constitutional arguments"); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding state law denying women the right to practice law). However, successful equal protection challenges to legislation were not unknown. Legislation drawn along racial lines was invalidated under the equal protection clause, *see infra* note 3, and even economic legislation fell prey to equal protection challenges. *See, e.g.*, Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897) (regulation requiring railroads but not other defendants to pay attorneys' fees to successful plaintiffs held unconstitutional under equal protection clause).

2. The primary, although not necessarily the only purpose of the equal protection clause was to protect the newly freed slaves from the legislative disabilities imposed by the Black Codes, laws passed by Southern states after the Civil War. *See* STAMPP, THE ERA OF RECONSTRUCTION, 79-81, 135-45 (1965). *See also* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 70 (1873).

3. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (West Virginia statute excluding blacks from juries held to violate equal protection).

4. *See, e.g.*, Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 TULSA L.J. 183, 226-29 (1979); Weidner, *The Equal Protection Clause: The Continuing Search for Judicial Standards*, 57 U. DET. J. URB. L. 867, 881 (1980); Wilkerson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 947-54 (1975).

5. In addition to strict scrutiny and rationality review, intermediate review seems to be ac-

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COMMITTEE ON Judiciary

VISITORS' REGISTER H.B. 825 HB 451

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
Leslie Hughes	Montana Rifle & Pistol Assn Butte Gun Club	825	✓	
Charlie KISS	BUFFALO ROAD MUZZLELOADERS MS	825	✓	
W Sutton jr.	SELF	825	✓	
Lyd. G. BYERLY	Mt. Rifle + Pistol Assn	825	✓	
GRETTA ARENDT	SELF	451	✓	
Mark Johnson	J+CC-Cty Health Dept	451	— with amend.	
Greg Bartholomew	Lew City County Health	451	✓ with amend.	
Bruce DeSonia	Mt Dept Health + ES	451	✓ with amendments	
Ken Toole	Human Rights Network	"	✓ with amend	
Joan Bennett		451	✓	
DAVE BROWN	HD #72 - sponsor	HB 853 825	✓	
A.M. ELWELL	WCSM		—	
" "	MT Shooting Sports Assn		—	
" "	Bigsky Practical SS		—	
" "	Western MT F+G Assn.		—	
Vito Ciliberti	self + ci groups etc Missoula Ct, Women	HB825	✓	
Rick LaFave	MT. Sheriff's & Peace off	HB 825	—	
Bob Butorac	MT Sheriff & Peace Off Assn	HB 825	✓	
Holly Franz	Women's Law Section	HB 451	✓ with amendment	
John Connot	MT County Attys Assn	HB 451	✓	
Amy Feifer	Women's Law Section of State Bar	HB 451	✓ with amendment	
REP ROBERT CLARK	H.D. 31	H.B. 825	✓	
BILL SIMMERS	OUT IN MISSOULA	HB 451	with amend	
[illegible] O'Keefe	self	HB 451	with be amend	
Steve Kingsley	Out In Montana	HB 451	with amend.	
Jennifer Bottomly	SELF	HB 451	with amend.	

(Please leave prepared statement with Secretary)

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COMMITTEE ON Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Denise Sands	Mt. Women's Lobby	HB 457	w/amendment	
Anne MacDiarmid, Helena	self	HB 451	w/amend	
Liesl M. Bock, Missoula	ONF / Lambda Alliance	HB 451	w/amend	
Kathleen (Kerrie) Frank, Mila	Vice-President O.I.M.	HB 451	w/amend	
Fred Wilson	MT Family Coalition	HB 451	X / LEA Amend	
Bryan D. Spillman	self - MT Human Rights Network	HB 451	w/amend	
Linda Gryczan	Montana Lesbian Coalition	461	✓	
Scott Crichton	ACLU	451	✓ as amended	

(Please leave prepared statement with Secretary)

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Senator Halligan made a motion to approve the amendment suggested by Senator Towe. The motion carried unanimously.

Senator Towe said he did not explain #6 of his amendments, "except for actions constituting negligence or wilful misconduct".

Senator Svrcek's motion that HB 825 BE CONCURRED IN AS AMENDED carried with all members voting aye except Senator Harp who voted no.

EXECUTIVE ACTION ON HOUSE BILL 451

Motion:

Discussion:

Amendments, Discussion, and Votes:

Valencia Lane reported that the sponsor's amendment would return the bill to its original form (Exhibit #5). She reminded the Committee that the bill would remove deviate sexual conduct and the penalty from the Code and would repeal bestiality and homosexual consensual sex.

Valencia Lane advised the Committee that Section 20, page 12, of the Second Reading copy of the bill (blue) is amended to leave bestiality in the law and remove homosexual consensual sex from the law. She also provided amendments proposed by Senator Svrcek (Exhibit #6).

Senator Halligan stated that he has been on the Governor's AIDS Advisory Council for about four years. He said pediatric and heterosexual AIDS also needs to be addressed, and that his focus is on children. Senator Halligan stated he did not want to get into an emotional conflict. He said he believes decriminalization will get people in for testing, as shown by national statistics.

Senator Crippen stated that Representative Lee's amendment was designed to meet this problem, and asked why it wouldn't work. Senator Towe replied that Representative Lee's amendment (page 38, lines 8-14) says the fact that a person seeks testing or treatment may not be used as a basis for prosecution, but it is still a crime. He said he agreed with Senator Halligan, and that as much as he personally detests this activity, he doesn't see why the Committee should not pass this legislation.

Chairman Pinsoneault stated that the answer to the AIDS problem is testing every individual in this country. He said he is not in favor of decriminalizing bestiality or homosexual behavior among men.

Valencia Lane stated that Senators Pinsoneault and Svrcek's amendments are essentially similar enough to merge.

Senator Crippen asked Senator Halligan if he were saying that the only way to meet the testing problem is to decriminalize homosexual consensual sex.

Senator Doherty commented that John Connor stated this is a very difficult crime to prosecute.

Chairman Pinsoneault stated that just because it isn't prosecuted doesn't mean it can't be.

Senator Doherty stated that the virus is not specific to homosexual men. He said Representative Lee's amendment should be looked upon as an attempt to justify what is there, medically.

Senator Rye stated that laws are passed reflective of values. He said he believes the Legislature needs to occasionally make a statement regarding what it values most, and that it should stay that way.

Senator Halligan said he somewhat agreed with Senator Rye, but the Constitution guarantees the right of privacy.

Recommendation and Vote:

Senator Svrcek made a motion that HB 451 BE TABLED. The motion failed 6-6 in a roll call vote (attached).

* * * * * *

The meeting was recessed at 7:56 a.m. and reconvened at 12 noon.

* * * * * *

EXECUTIVE ACTION ON SENATE BILL 427

Motion:

Discussion:

Amendments, Discussion, and Votes:

Senator Mazurek, Subcommittee Chairman, for SB 427, said he and Senators Brown, Svrcek, and Halligan met last week and on April 2, 1991 with all concerned parties (Gambling Control Division, Tavern Owners, Gaming Association, Don't Gamble with the Future, Association of Churches) to come up with proposed changes in the gaming law.

Ms. Menzies advised the Committee that Section 46 addresses placement of video gambling machines in rooms where alcoholic beverages are sold; Section 47 addresses theft from video gambling machines with exceptions if they are not paid by insurance or if law enforcement is not called; Section 47 also removes the internal quota on machines and allows 20 poker machines; Section 49 provides for fees on a pro-rated, quarterly basis; Section 50 addresses sale of gambling machines; Section 51 statutorily appropriates payments received by the Department of Justice for approval costs; Section 53 revises the statutory appropriation law to include retention of permit fees; 23-5-136, MCA, provides that one-half of fees go to the counties and the other half go to the General Fund.

Senator Mazurek made a motion to approve the amendments on Exhibit #7.

Senator Towe asked if sports betting is illegal (new Section 24). Lois Menzies replied this section was put in the bill to limit sports betting, as bookmaking is illegal.

Senator Mazurek stated that the broader definition of sports pools conforms to existing practices.

Chairman Pinsoneault asked if a wager on an NCAA game is prohibited. Lois Menzies replied it would be.

Senator Towe asked if office sports pools would be banned. Senator Mazurek replied they are allowed currently.

Senator Grosfield asked about "pan" in Section 35 on page 10. Lois Menzies replied that dealers must have a license. She stated that an operator with a liquor license who is not interested in operating a card game could contract with a card room contractor as an independent agent.

Senator Mazurek's motion to amend SB 427 carried unanimously.

Senator Mazurek made a motion to amend SB 427 to allow fishing derbies and wagers on natural occurrences. The motion carried unanimously.

Recommendation and Vote:

Senator Mazurek made a motion that SB 427 DO PASS AS AMENDED. The motion carried unanimously.

EXECUTIVE ACTION ON HOUSE BILL 451

Motion:

Senator Halligan made a motion that HB 451 BE CONCURRED IN as it came from the House.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

Senator Halligan's motion carried with all members voting aye except Senators Rye, Svrcek, Doherty who voted no.

EXECUTIVE ACTION ON HOUSE BILL 159

Motion:

Discussion:

Amendments, Discussion, and Votes:

Valencia Lane provided Chairman Pinsoneault's amendments, and stated that since she drafted them she found that changes need to be made. She commented that a gray bill was not made up, and said one concern is with the measure of damages (Exhibit #8 - hb015902.avl). Valencia Lane further stated that page 2, lines 5-8 would be changed to "the same as provided in 27-1-311, MCA, except that the total amount assessed against the successful bidder by all litigants may not exceed ten percent of the successful bidder's bid".

Valencia Lane provided Senator Towe's amendments, which are not limited to the next lowest bidder, and said it provides for proof to recover damages and also limits damages (Exhibit #9).

Chairman Pinsoneault asked Bill Gianoulias, Tort Claims Division, Department of Administration, to comment on who makes determinations concerning violation of law. Mr. Gianoulias replied that the bill creates a private cause of action and that it would be up to the plaintiff. He said he spoke with David Scott, Department of Labor, who advised him it would not stop a contract. He said labor has authority, as workers can enforce their right to prevailing wage.

Senator Towe said he tried to make this point in his amendment #2.

Chairman Pinsoneault asked if anything in the law addresses this now. Dal Smilie, Chief Counsel, Tort Claims Division, said he believes there is prevailing wage, workers' compensation, and unemployment compensation , and that the Department of Labor told

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 3 Apr 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

April 3, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 451 (third reading copy -- blue), respectfully report that House Bill No. 451 be concurred in.

Signed: [signature]
Richard Pinsoneault, Chairman

4-3-91
Amd. Coord.

SB 4-3-91 3:15
Sec. of Senate

7014940C.SJI

EXH 6
HB 451
4/3/91

Amendments to House Bill No. 451
Third Reading Copy (BLUE)

Requested by Senator Svrcek
For the Committee on Judiciary

Prepared by Valencia Lane
April 1, 1991

1. Title, line 13.
Following: "~~45-2-104,~~"
Insert: "45-2-101,"

2. Page 38, line 13.
Following: line 12
Insert: "**Section 8.** Section 45-2-101, MCA, is amended to read:
"**45-2-101. General definitions.** Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

(1) "Acts" has its usual and ordinary meaning and includes any bodily movement, any form of communication, and where relevant, a failure or omission to take action.

(2) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

(3) "Another" means a person or persons, as defined in this code, other than the offender.

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses and includes all input, output, processing, storage, software, or communication facilities that are connected or related to such a device in a system or network.

(9) "Computer network" means the interconnection of communication systems between computers or computers and remote terminals.

(10) "Computer program" means an instruction or statement or a series of instructions or statements, in a form acceptable to a computer, that in actual or modified form permits the functioning of a computer or computer system and causes it to perform specified functions.

(11) "Computer services" include but are not limited to computer time, data processing, and storage functions.

(12) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(13) "Computer system" means a set of related, connected, or unconnected devices, computer software, or other related computer equipment.

(14) "Conduct" means an act or series of acts and the accompanying mental state.

(15) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(16) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(17) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

(18) "Defamatory matter" means anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or to injury to his or its business or occupation.

(19) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(20) "Deviate sexual relations" means ~~sexual contact or sexual intercourse between two persons of the same sex or~~ any

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form of sexual intercourse with an animal.

(21) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

(22) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(23) A "frisk" is a search by an external patting of a person's clothing.

(24) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

(25) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

(26) A "house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(27) "Human being" means a person who has been born and is alive.

(28) An "illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

(29) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

(30) "Intoxicating substance" means any controlled substance as defined in Title 50, chapter 32, and any alcoholic beverage, including but not limited to any beverage containing 1/2 of 1% or more of alcohol by volume. The foregoing definition does not extend to dealcoholized wine or to any beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than 1/2 of 1% of alcohol by volume.

(31) An "involuntary act" means any act which is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(32) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

(33) "Knowingly"--a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established

if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(34) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

(35) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as a result of the influence of an intoxicating substance.

(36) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

(37) "Negligently"--a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

(38) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

(39) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, or transfer of title to, interest in, or possession of property.

(40) "Occupied structure" means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

(41) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(42) "Offense" means a crime for which a sentence of death or of imprisonment or a fine is authorized. Offenses are classified as felonies or misdemeanors.

(43) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. Official detention does not include supervision of probation or parole, constraint incidental to

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release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(44) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

(45) "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(46) "Owner" means a person other than the offender who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(47) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

(48) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

(49) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(50) "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

(51) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

(52) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

(53) "Premises" includes any type of structure or building and any real property.

(54) "Property" means any tangible or intangible thing of value. Property includes but is not limited to:

(a) real estate;

(b) money;

(c) commercial instruments;

(d) admission or transportation tickets;

(e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner;

(f) things growing on, affixed to, or found on land and things which are part of or affixed to any building;

(g) electricity, gas, and water;

(h) birds, animals, and fish which ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms,

specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof;

(j) any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement; and

(k) electronic impulses, electronically processed or produced data or information, commercial instruments, computer software or computer programs, in either machine- or human-readable form, computer services, any other tangible or intangible item of value relating to a computer, computer system, or computer network, and any copies thereof.

(55) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender himself may have an interest in the property.

(56) "Public place" means any place to which the public or any substantial group thereof has access.

(57) "Public servant" means any officer or employee of government, including but not limited to legislators, judges, and firefighters, and any person participating as a juror, advisor, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term "public servant" includes one who has been elected or designated to become a public servant.

(58) "Purposely"--a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

(59) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. It includes serious mental illness or impairment.

(60) "Sexual contact" means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

(61) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

(62) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an

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offense.

(63) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

(64) "Statute" means any act of the legislature of this state.

(65) "Stolen property" means property over which control has been obtained by theft.

(66) A "stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

(67) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

(68) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit any criminal offense;

(d) accuse any person of a criminal offense;

(e) expose any person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of any person;

(g) reveal any information sought to be concealed by the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause such action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(69) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be considered the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be considered the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(iii) The value of electronic impulses, electronically produced data or information, computer software or programs, or any other tangible or intangible item relating to a computer, computer system, or computer network shall be considered to be the amount of economic loss that the owner of the item might

reasonably suffer by virtue of the loss of the item. The determination of the amount of such economic loss includes but is not limited to consideration of the value of the owner's right to exclusive use or disposition of the item.

(b) When it cannot be determined if the value of the property is more or less than $300 by the standards set forth in subsection (69)(a) above, its value shall be considered to be an amount less than $300.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

(70) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision for transport of an operator.

(71) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

(72) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding.""

Renumber: subsequent section

Ex. 6a
HB 451
4-3-91

March 31st 1991

Senator Pinsoneault,

I am a Montanan. I have lived in the state for the entirety of my 28 years. I am a graduate of Charles M. Russell High School, of the University of Montana, a child of the wide sky and rolling plains of the east where I worked summers on my uncle's farm, a child of the rugged mountains of the west where I camped, fished and backpacked with my father. I am a Montanan and I am gay.

There is perhaps in the imagination of some of the members of the legislature the idea that gay men and women are the products of the decadent urbanity of New York City or San Francisco. The irony in this perception is the fact that the highly vocal and visible gay civil rights movements of America's metropolitan cities are made up of the alienated children of the hinterlands: Montanans, Iowans, Oklahomans(etc.) who have left their rural homes in search of the tolerance and respect that was there lacking. Gay people are not some "other" that have invaded the state from the outside. Those of us who have remained here(for love of our families or for love of the land) ask only for equal protection under the law, the right to privacy and the right to love.

I have been gay all of my life, aware of my predisposition toward my own sex since my memories begin. I was gay when I played flag football at Riverview Elementary School, when I ran for student body president of North Junior High, when I attended National 4-H Congress after 9 years of club service and when I was elected president of the Rocky Mountain District Youth of the American Lutheran Church. And I way gay when I fell in love with the man with whom I have lived for the past six years. A law that names us as felons does nothing to invalidate our relationship and does nothing to stop either the sexual instinct or the instinct to love. What such a law does do is breed the sort of intolerance that was voiced in last weeks judiciary committee meeting, the sort of intolerance that is behind gay-bashing incidents by way of saying that gay women and men are second-class citizens, the sort of intolerance that has no place in a democracy.

It may be true that tolerance cannot be legislated anymore than morality can, but it is equally true that bigotry and bias have no place in the law of this state or of this nation. I encourage you to support the Halligan amendment that would include decriminalization of consensual acts between adults in HB 451. Some Montanans are gay. The law cannot change that fact so it is time for the law to change.

Sincerely,

T. Sean Dwyer
205 Chestnut
Missoula Mt 59802

P.S. I encourage you to share my thoughts and copies of this letter with other members of the committee and of the legislature if you think it may win support for the amendment.

Ex. 6a
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Fax-Kinko's

Senator Dick Pinsoneault-State Capitol-Helena, Mt.
Senator Bill Yellowtail
Senator Tom Towe
Senator Paul Svrcek
Representative Vivian Brooke

Re: H.B. 451: Senator Dick Pinsoneault's legal commentary Miltary homosexual views are outdated fifty years with many states making these necessary changes. The Supreme Court has made legal rulings favoring homosexuals. They are not criminals for persecution in our society. Montana State laws need favorable chabges with the removal of bias opinions in laws that were enacted 50 years ago.

I urge your help to not enact laws that place homosexuals as criminals under Montana State laws.

Edward Sharp
Wilma Bldg
Missoula, Mont 59802
(406) 543-4166

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3 Apr Bill No. HB451 Time 7:55 a.m.

NAME	YES	NO
Sen. Brown		✓
Sen. Crippen	✓	
Sen. Doherty		✓
Sen. Grosfield		✓
Sen. Halligan		✓
Sen. Harp	✓	
Sen. Mazurek		✓
Sen. Rye	✓	
Sen. Svrcek	✓	
Sen. Towe		✓
Sen. Yellowtail		✓
Sen. Pinsoneault	✓	
	5	7

Jody Bird
Secretary

Sen. Dick Pinsoneault
Chairman

Motion: C. Sur - tabled

SF-3 (Rev. 1987)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 30 Apr 91 Bill No. HB451 Time 9:55 am

NAME	YES	NO
Sen. Brown		✓
Sen. Crippen		✓
Sen. Doherty	✓	
Sen. Grosfield		✓
Sen. Halligan	✓	
Sen. Harp		✓
Sen. Mazurek	✓	
Sen. Rye		✓
Sen. Svrcek	✓	
Sen. Towe	✓	
Sen. Yellowtail	✓	
Sen. Pinsoneault		✓
	6	6

Jody Bird
Secretary

Sen. Dick Pinsoneault
Chairman

Motion: (F. Hall - not to amend

14

Free Conference Committee
on House Bill 451
Report No. 1, April 19, 1991

4-19-91 3:15pm

Mr. Speaker and Mr. President:

We, your Free Conference Committee met and considered House Bill 451 and recommend that House Bill 451 (reference copy -- salmon) be amended as follows:

1. Page 2, line 7.
Following: the first "infliction"
Insert: ","
Strike: "OR"

2. Page 2, line 8.
Following: "~~offender~~"
Insert: ", or threatened infliction"

3. Page 2, line 10.
Following: "i"
Insert: "or"

4. Page 2, lines 11 through 14.
Strike: subsection (b) in its entirety
Renumber: subsequent subsection

5. Page 2, lines 16 and 17.
Following: "~~another~~" on line 16
Strike: remainder of line 16 through "VICTIM" on line 17

6. Page 38, line 13.
Following: line 12
Insert: "NEW SECTION. Section 8. Coordination. The amendment in section 1, Chapter 218, Laws of 1991, inserting subsection (2)(b) of 45-5-501 is void."
Renumber: subsequent section

ADOPT

REJECT

841338CC.HSF

And this Free Conference Committee report be adopted.

For the House:

Rep. Brooke, Chair

Rep. Toole

Rep. Mercer

For the Senate:

Sen. Svrcek, Chair

Sen. Doherty

Sen. Grosfield

841338CC.HS

HOUSE BILL NO. 451

INTRODUCED BY BROOKE, YELLOWTAIL, HANSEN, COCCHIARELLA, J. BROWN, JACOBSON, STRIZICH, WYATT, COHEN, DARKO, BARNHART, REAM, FRITZ, O'KEEFE, DRISCOLL, BECKER, SCHYE, D. BROWN, BRADLEY, WANZENRIED, TOOLE, CONNELLY

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE LAWS RELATING TO SEXUAL CRIMES; DEFINING FORCE FOR PURPOSES OF SEXUAL INTERCOURSE WITHOUT CONSENT; REMOVING SPOUSAL EXEMPTIONS; INCREASING PENALTIES; ~~REPEALING~~ AMENDING CLARIFYING THE BASIS FOR A PROSECUTION FOR THE CRIME OF DEVIATE SEXUAL CONDUCT; AMENDING SECTIONS ~~27-2-216~~, ~~45-1-205~~, ~~45-2-101~~, ~~45-2-103~~, ~~45-2-104~~, 45-5-501, 45-5-502, 45-5-503, 45-5-504, ~~45-5-505~~, 45-5-505, 45-5-507, AND 45-5-511, ~~46-15-401~~, ~~46-18-111~~, ~~46-18-201~~, ~~46-23-502~~, ~~50-20-109~~, AND ~~61-5-405~~, MCA; ~~REPEALING SECTION 45-5-505~~, MCA, AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 45-5-501, MCA, is amended to read:

"45-5-501. Definition. (1) As used in 45-5-503 and 45-5-505, the term "without consent" means:

~~(1)~~(a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping to be inflicted on anyone; or

~~(2)~~(b) the victim is incapable of consent because he is:

~~(a)~~(i) mentally defective or incapacitated;

~~(b)~~(ii) physically helpless; or

~~(c)~~(iii) less than 16 years old.

(2) As used in subsection (1), "force" means:

(a) the infliction, ~~OR~~ attempted infliction, ~~or threatened infliction by the offender~~, OR THREATENED INFLICTION of bodily injury or THE commission ~~or threat of any other crime~~ OF A FORCIBLE FELONY by the offender; OR ~~against the victim or another~~

~~(B) THE THREATENED INFLICTION OF INJURY OR THE THREAT OF A FORCIBLE FELONY AND THE OFFENDER that causes the victim to reasonably believe that the offender has the present ability to execute the threat; or~~

~~(b)~~(B) the threat of SUBSTANTIAL retaliatory action ~~by the offender against the victim or another AGAINST A SUBSTANTIAL AND PROTECTED INTEREST OF THE VICTIM~~ that causes the victim to reasonably believe that the offender has the ability to execute the threat."

Section 2. Section 45-5-502, MCA, is amended to read:

"45-5-502. Sexual assault. (1) A person who knowingly subjects another ~~not his spouse~~ PERSON to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined

REFERENCE BILL: Includes Free Conference Committee Report Dated 4-19-91

not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed 20 years and may be fined not more than $50,000.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if the victim is less than 14 years old and the offender is 3 or more years older than the victim."

Section 3. Section 45-5-503, MCA, is amended to read:

"**45-5-503. Sexual intercourse without consent.** (1) A person who knowingly has sexual intercourse without consent with ~~a person of the opposite sex~~ another PERSON commits the offense of sexual intercourse without consent. A person may not be convicted under this section based on the age of his spouse as provided in 45-5-501~~(2)(c)~~ (1)(b)(iii).

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, except as provided in

46-18-222.

(3) (a) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-222.

(b) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

(4) In addition to any sentence imposed under subsection (2) or (3), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244."

Section 4. Section 45-5-504, MCA, is amended to read:

"**45-5-504. Indecent exposure.** (1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person ~~other than his spouse~~, exposes his genitals under circumstances in which he knows his conduct is likely

to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both."

Section 5. Section 45-5-507, MCA, is amended to read:

"**45-5-507. Incest.** (1) A person commits the offense of incest if he knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact as defined in 45-2-101 with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. The relationships referred to herein include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter.

(2) Consent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.

(3) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed ~~10~~ 20 years or be fined an amount not to exceed $50,000, or both.

(4) If the victim is under 16 years of age and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of

committing incest, he shall be imprisoned in the state prison for any term not to exceed ~~20~~ ~~40~~ 20 years and may be fined not more than $50,000.

(5) In addition to any sentence imposed under subsection (3) or (4), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244."

Section 6. Section 45-5-511, MCA, is amended to read:

"**45-5-511. Provisions generally applicable to sexual crimes.** (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

~~(2) Whenever the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as husband and wife regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart whether under a decree of judicial separation or otherwise. Where the definition of an offense excludes conduct with a spouse,~~

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~~this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.~~

~~(3) In a prosecution under the preceding sections on sexual crimes (45-5-502 through 45-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant and the intoxicating substance was voluntarily and knowingly taken.~~

~~(4)~~(2) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except:

~~(a) evidence of the victim's past sexual conduct with the offender;~~

~~(b)~~ EVIDENCE OF THE VICTIM'S PAST SEXUAL CONDUCT WITH THE OFFENDER OR evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.

~~(5)~~(3) If the defendant proposes for any purpose to offer evidence described in subsection ~~(4)(a) or (4)(b)~~(2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection ~~(4)~~(2).

~~(6)~~(4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the

credibility of the victim.

~~(7)~~(5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent."

~~Section 7.~~ Section ~~45-2-101, MCA,~~ is amended to read:

~~"45-2-101. General definitions. Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:~~

~~(1) "Acts" has its usual and ordinary meaning and includes any bodily movement, any form of communication, and where relevant, a failure or omission to take action.~~

~~(2) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.~~

~~(3) "Another" means a person or persons, as defined in this code, other than the offender.~~

~~(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures~~

which a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or any impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan which results in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses and includes all input, output, processing, storage, software, or communication facilities that are connected or related to such a device in a system or network.

(9) "Computer network" means the interconnection of communication systems between computers or computers and remote terminals.

(10) "Computer program" means an instruction or statement or a series of instructions or statements, in a form acceptable to a computer, that in actual or modified form permits the functioning of a computer or computer system and causes it to perform specified functions.

(11) "Computer services" include but are not limited to computer time, data processing, and storage functions.

(12) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(13) "Computer system" means a set of related, connected or unconnected devices, computer software, or other related computer equipment.

(14) "Conduct" means an act or series of acts and the accompanying mental state.

(15) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(16) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(17) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true;

(b) fail to correct a false impression which the offender previously has created or confirmed;

(c) prevent another from acquiring information

pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

(18) "Defamatory matter" means anything which exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or to injury to his or its business or occupation.

(19) "Deprive" means to withhold property of another:

(a) permanently;

(b) for such a period as to appropriate a portion of its value;

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(20) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or

any form of sexual intercourse with an animal.

(20) "Deviate sexual relations" means sexual contact or sexual intercourse between two person of the same sex or any form of sexual intercourse with an animal.

(21) (20) (21) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding 1 year.

(22) (21) (22) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(23) (22) (23) A "frisk" is a search by an external patting of a person's clothing.

(24) (23) (24) "Government" includes any branch, subdivision, or agency of the government of the state or any locality within it.

(25) (24) (25) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to any person or entity in whose welfare he is interested.

(26) (25) (26) A "house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(27) (26) (27) "Human being" means a person who has been born and is alive.

~~(28)~~ (27) ~~(28)~~ An "illegal article" is an article or thing which is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

~~(29)~~ (28) ~~(29)~~ "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

~~(30)~~ (29) ~~(30)~~ "Intoxicating substance" means any controlled substance as defined in Title 50, chapter 32, and any alcoholic beverage, including but not limited to any beverage containing 1/2 of 1% or more of alcohol by volume. The foregoing definition does not extend to dealcoholized wine or to any beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than 1/2 of 1% of alcohol by volume.

~~(31)~~ (30) ~~(31)~~ An "involuntary act" means any act which is:

~~(a)~~ a reflex or convulsion;

~~(b)~~ a bodily movement during unconsciousness or sleep;

~~(c)~~ conduct during hypnosis or resulting from hypnotic suggestion; or

~~(d)~~ a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

~~(32)~~ (31) ~~(32)~~ "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in

this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

~~(33)~~ (32) ~~(33)~~ "Knowingly" a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

~~(34)~~ (33) ~~(34)~~ "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

~~(35)~~ (34) ~~(35)~~ "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as a result of the influence of an intoxicating substance.

~~(36)~~ (35) ~~(36)~~ "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the

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county jail for any term or a fine, or both, or the sentence imposed is imprisonment in the state prison for any term of 1 year or less.

(37) (36) (37) "Negligently" a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists or when he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

(38) (37) (38) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

(39) (38) (39) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or sale, conveyance, or transfer of title to, interest in, or

possession of property.

(40) (39) (40) "Occupied structure" means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

(41) (40) (41) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(42) (41) (42) "Offense" means a crime for which a sentence of death or of imprisonment or a fine is authorized. Offenses are classified as felonies or misdemeanors.

(43) (42) (43) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. Official detention does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

~~(44)~~ (43) ~~(44)~~ - "Official proceeding" means a proceeding heard or which may be heard before any legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or deposition in connection with such proceeding.

~~(45)~~ (44) ~~(45)~~ - "Other state" means any state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

~~(46)~~ (45) ~~(46)~~ - "Owner" means a person other than the offender who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

~~(47)~~ (46) ~~(47)~~ - "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

~~(48)~~ (47) ~~(48)~~ - "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

~~(49)~~ (48) ~~(49)~~ - "Pecuniary benefit" is benefit in the form

of money, property, commercial interests, or anything else the primary significance of which is economic gain.

~~(50)~~ (49) ~~(50)~~ - "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

~~(51)~~ (50) ~~(51)~~ - "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

~~(52)~~ (51) ~~(52)~~ - "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

~~(53)~~ (52) ~~(53)~~ - "Premises" includes any type of structure or building and any real property.

~~(54)~~ (53) ~~(54)~~ - "Property" means any tangible or intangible thing of value. Property includes but is not limited to:

(a) real estate,

(b) money,

(c) commercial instruments,

(d) admission or transportation tickets,

(e) written instruments which represent or embody rights concerning anything of value, including labor or services, or which are otherwise of value to the owner,

(f) things growing on, affixed to, or found on land and things which are part of or affixed to any building,

~~(g)--electricity,-gas,-and-water;~~

~~(h)--birds,--animals,-and-fish-which-ordinarily-are-kept in-a-state-of-confinement;~~

~~(i)--food-and-drink,-samples,-cultures,--microorganisms, specimens,---records,---recordings,--documents,--blueprints, drawings,-maps,-and-whole-or-partial--copies,--descriptions, photographs,-prototypes,-or-models-thereof;~~

~~(j)--any-other-articles,-materials,-devices,-substances, and--whole--or--partial--copies,--descriptions,-photographs, prototypes,-or-models-thereof-which--constitute,--represent, evidence,--reflect,--or-record-secret-scientific,-technical, merchandising,-production,-or-management--information--or--a secret--designed--process,-procedure,-formula,-invention,-or improvement;-and~~

~~(k)--electronic-impulses,--electronically--processed--or produced---data---or--information,--commercial--instruments, computer-software-or-computer-programs,-in--either--machine- or---human-readable---form,--computer--services,--any--other tangible-or-intangible-item-of-value-relating-to-a-computer, computer--system,--or--computer--network,--and--any---copies thereof.~~

~~(55)~~ (54) ~~(55)~~ "Property---of---another"---means--real--or personal-property-in-which-a-person-other-than-the--offender has--an--interest--which--the--offender--has-no-authority-to defeat-or-impair,-even-though-the-offender-himself-may--have

an-interest-in-the-property.

~~(56)~~ ~~(55)~~ (56) "Public-place"-means-any-place-to-which-the public-or-any-substantial-group-thereof-has-access.

~~(57)~~ ~~(56)~~ (57) "Public---servant"--means--any--officer--or employee--of--government,--including--but--not--limited---to legislators,---judges,--and--firefighters,--and--any--person participating---as----a----juror,----advisor,----consultant, administrator,---executor,---guardian,---or--court-appointed fiduciary.-The-term-does-not--include--witnesses.--The--term "public--servant"--includes--one--who--has--been--elected-or designated-to-become-a-public-servant.

~~(58)~~ ~~(57)~~ ~~(58)~~ "Purposely"--a-person-acts--purposely--with respect--to--a--result--or-to-conduct-described-by-a-statute defining-an-offense-if-it-is-his-conscious-object-to--engage in--that--conduct-or-to-cause-that-result.-When-a-particular purpose--is--an--element--of--an--offense,--the--element--is established-although-such-purpose-is-conditional,-unless-the condition-negatives-the-harm-or-evil-sought-to-be--prevented by--the--law--defining-the-offense.-Equivalent-terms-such-as "purpose"-and-"with-the-purpose"-have-the-same-meaning.

~~(59)~~ ~~(58)~~ ~~(59)~~ "Serious-bodily-injury"-means-bodily-injury which-creates-a-substantial-risk-of-death--or--which--causes serious---permanent--disfigurement--or--protracted--loss--or impairment-of-the-function-or-process-of-any--bodily--member or-organ.-It-includes-serious-mental-illness-or-impairment.

{60}{59}{60}-"Sexual--contact"-means-any-touching-of-the sexual-or-other-intimate-parts-of-the-person-of-another--for the--purpose--of-arousing-or-gratifying-the-sexual-desire-of either-party.

{61}{60}{61}-"Sexual-intercourse"-means--penetration--of the--vulva,--anus,--or--mouth--of-one-person-by-the-penis-of another-person,-penetration-of-the--vulva--or--anus--of--one person--by-any-body-member-of-another-person,-or-penetration of-the-vulva-or-anus-of-one-person-by-any-foreign-instrument or-object-manipulated-by-another-person-for-the--purpose--of arousing--or--gratifying--the-sexual-desire-of-either-party. Any-penetration,-however-slight,-is-sufficient.

{62}{61}{62}-"Solicit"--or---"solicitation"---means---to command,-authorize,-urge,-incite,-request,-or-advise-another to-commit-an-offense.

{63}{62}{63}-"State"--or-"this-state"-means-the-state-of Montana,-all-the-land-and-water--in--respect--to--which--the state---of---Montana--has--either--exclusive--or--concurrent jurisdiction,-and-the-air-space-above-such-land-and-water.

{64}{63}{64}-"Statute"-means-any-act-of-the--legislature of-this-state.

{65}{64}{65}-"Stolen-property"-means-property-over-which control-has-been-obtained-by-theft.

{66}{65}{66}-A--"stop"--is--the-temporary-detention-of-a person-that-results-when-a-peace-officer-orders--the--person

to-remain-in-his-presence.

{67}{66}{67}-"Tamper"--means-to-interfere-with-something improperly,-meddle-with-it,-make-unwarranted-alterations--in its-existing-condition,-or-deposit-refuse-upon-it.

{68}{67}{68}-"Threat"----means----a----menace,---however communicated,-to:

{a}--inflict-physical-harm-on-the-person--threatened--or any-other-person-or-on-property;

{b}--subject--any--person--to--physical--confinement--or restraint;

{c}--commit-any-criminal-offense;

{d}--accuse-any-person-of-a-criminal-offense;

{e}--expose-any-person-to-hatred,-contempt,-or-ridicule;

{f}--harm-the-credit-or-business-repute-of-any-person;

{g}--reveal--any--information--sought-to-be-concealed-by the-person-threatened;

{h}--take--action--as--an--official--against--anyone--or anything,-withhold-official-action,-or-cause-such-action--or withholding;

{i}--bring-about-or-continue-a-strike,-boycott,-or-other similar-collective-action-if-the-property-is-not-demanded-or received--for-the-benefit-of-the-groups-which-he-purports-to represent;-or

{j}--testify--or---provide---information---or---withhold testimony--or--information--with--respect-to-another's-legal

claim or defense.

(69)(68)(69) (a) "Value" means the market value of the property at the time and place of the crime or, if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be considered the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be considered the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(iii) The value of electronic impulses, electronically produced data or information, computer software or programs, or any other tangible or intangible item relating to a computer, computer system, or computer network shall be considered to be the amount of economic loss that the owner

of the item might reasonably suffer by virtue of the loss of the item. The determination of the amount of such economic loss includes but is not limited to consideration of the value of the owner's right to exclusive use or disposition of the item.

(b) When it cannot be determined if the value of the property is more or less than $300 by the standards set forth in subsection (69)(a) above (68)(a), its value shall be considered to be an amount less than $300.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

(70)(69)(70) "Vehicle" means any device for transportation by land, water, or air or mobile equipment with provision for transport of an operator.

(71)(70)(71) "Weapon" means any instrument, article, or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

(72)(71)(72) "Witness" means a person whose testimony is desired in any official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding."

Section 8. Section 27-2-216, MCA, is amended to read:

"27-2-216. Tort actions -- childhood sexual abuse. (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:

(a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or

(b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

(2) It is not necessary for a plaintiff to establish which act, in a series of acts of childhood sexual abuse, caused the injury that is the subject of the suit. The plaintiff may compute the period referred to in subsection (1)(a) from the date of the last act by the same perpetrator.

(3) As used in this section, "childhood sexual abuse" means any act committed against a plaintiff who was less than 18 years of age at the time the act occurred and that would have been a violation of 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625, or prior similar laws in effect at the time the act occurred.

(4) The provisions of 27-2-401 apply to this section."

Section 9. Section 45-1-205, MCA, is amended to read:

"45-1-205. General time limitations. (1) (a) A prosecution for deliberate, mitigated, or negligent homicide

may be commenced at any time.

(b) A prosecution under 45-5-502 through 45-5-505 45-5-504, 45-5-507, or 45-5-625 may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years old at the time the offense occurred.

(2) Except as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony must be commenced within 5 years after it is committed.

(b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination thereof;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not himself a party to the offense or, in the absence of such discovery, within 1 year after the prosecuting officer becomes aware of the offense.

~~(4)--The--period--prescribed--in-subsection-(2)-shall-be extended-in-a-prosecution-for-unlawful-use--of--a--computer, and--prosecution--shall--be--brought-within-1-year-after-the discovery-of-the-offense-by-the-aggrieved--person--or--by--a person--who--has--legal--capacity--to-represent-an-aggrieved person-or-has-a-legal-duty-to-report-the-offense-and-is--not himself--a--party--to-the-offense-or,-in-the-absence-of-such discovery,-within--1--year--after--the--prosecuting--officer becomes-aware-of-the-offense.~~

~~(5)--An--offense--is-committed-either-when-every-element occurs-or,-when-the--offense--is--based--upon--a--continuing course-of-conduct,-at-the-time-when-the-course-of-conduct-is terminated.--Time-starts-to-run-on-the-day-after-the-offense is-committed.~~

~~(6)--A--prosecution--is---commenced---either---when---an indictment--is--found--or--an--information--or--complaint-is filed.~~"

Section 9.--Section-45-2-103,-MCA,-is-amended-to-read:

"45-2-103.--General-requirements--of--criminal--act--and mental--state.-~~(1)~~-Except-for-deliberate-homicide-as-defined in-45-5-102~~(1)(b)~~-or--an--offense--which--involves--absolute liability,-a-person-is-not-guilty-of-an-offense-unless,-with respect--to--each--element-described-by-the-statute-defining the-offense,-he-acts-while-having-one-of-the--mental--states described-in-subsections-~~(33)~~(32),-~~(37)~~(36),-and-~~(58)~~(57) of

~~45-2-101.~~

~~(2)--In--deliberate--homicide--under-45-5-102(1)(b),-the offender-must-act-while-having-the-mental-state-of-purposely or-knowingly-only-as-to-the-underlying-felony-referred-to-in 45-5-102(1)(b).~~

~~(3)--The-existence-of-a-mental--state--may--be--inferred from-the-acts-of-the-accused-and-the-facts-and-circumstances connected-with-the-offense.~~

~~(4)--If--the--statute--defining--an-offense-prescribes-a particular-mental-state-with-respect-to--the--offense--as--a whole-without-distinguishing-among-the-elements-thereof,-the prescribed-mental-state-applies-to-each-such-element.~~

~~(5)--Knowledge---that--certain--conduct--constitutes--an offense--or--knowledge--of--the---existence,---meaning,---or application--of--the--statute--defining-an-offense-is-not-an element-of-the-offense-unless-the-statute-clearly-defines-it as-such.~~

~~(6)--A-person's-reasonable-belief-that-his-conduct--does not-constitute-an-offense-is-a-defense-if:~~

~~(a)--the---offense---is--defined--by--an--administrative regulation-or-order-which-is-not-known-to-him--and--has--not been-published-or-otherwise-made-reasonably-available-to-him and--he--could--not--have--acquired--such--knowledge--by-the exercise-of-due-diligence-pursuant-to-facts-known-to-him;~~

~~(b)--he-acts-in-reliance-upon-a-statute-which--later--is~~

determined to be invalid;

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret such statute.

(7) If a person's reasonable belief is a defense under subsection (6), nevertheless he may be convicted of an included offense of which he would be guilty if the law were as he believed it to be.

(8) Any defense based upon this section is an affirmative defense."

Section 10. Section 45-2-104, MCA, is amended to read:

"45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in subsections (33) (32), (37) (36), and (50) (57) of 45-2-101 only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described."

Section 11. Section 46-15-401, MCA, is amended to read:

"46-15-401. When videotaped testimony admissible. For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507 and for the prosecution of any offense arising from the same transaction, as defined in 46-11-501, the testimony of the victim, at the request of such victim and with the concurrence of the prosecuting attorney, may be recorded by means of videotape for presentation at trial. The testimony so recorded may be presented at trial and shall be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence."

Section 12. Section 46-18-111, MCA, is amended to read:

"46-18-111. Presentence investigation. No defendant convicted of an offense under 45-5-502 through 45-5-505 45-5-504, 45-5-507, or 45-5-625 against a victim who was less than 16 years old when the offense was committed may be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court. The investigation must include an evaluation of the defendant and a recommendation as to treatment by a person qualified by professional experience. No defendant convicted of any other offense that may result in commitment for 1 year or more in the state prison may be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court unless the court deems such report unnecessary. The court may, in its discretion, order a

presentence investigation for a defendant convicted of any lesser crime or offense."

Section 14. Section 46-18-201, MCA, is amended to read:

"46-18-201. Sentences that may be imposed. (1) Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, the court may:

(a) defer imposition of sentence, excepting sentences for driving under the influence of alcohol or drugs, for a period, except as otherwise provided, not exceeding 1 year for any misdemeanor or for a period not exceeding 3 years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) restitution;

(v) payment of the costs of confinement;

(vi) payment of a fine as provided in 46-18-231;

(vii) payment of costs as provided in 46-18-232 and 46-18-233;

(viii) payment of costs of court appointed counsel as provided in 46-8-113;

(ix) community service;

(x) any other reasonable conditions considered necessary for rehabilitation or for the protection of society; or

(xi) any combination of the above.

(b) suspend execution of sentence up to the maximum sentence allowed for each particular offense. The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Reasonable restrictions or conditions may include any of those listed in subsections (1)(a)(i) through (1)(a)(xi).

(c) impose a fine as provided by law for the offense;

(d) require payment of costs as provided in 46-18-232 or payment of costs of court appointed counsel as provided in 46-8-113;

(e) commit the defendant to a correctional institution, with or without a fine as provided by law for the offense;

(f) impose any combination of subsections (1)(b) through (1)(e).

(2) If any financial obligation is imposed as a condition under subsection (1)(a), sentence may be deferred for a period not exceeding 2 years for any misdemeanor or for a period not exceeding 6 years for any felony, regardless of whether any other conditions are imposed.

(3) If any restrictions or conditions imposed under

subsection--(1)(a)--or--(1)(b)-are-violated,-the-court-shall consider-any-elapsed-time-and-either-expressly-allow-part-or all-of-it-as-a-credit-against-the-sentence-or-reject-all--or part-as-a-credit-and-state-its-reasons-in-the-order.-Credit, however,-must-be-allowed-for-jail-time-already-served.

(4)--Except--as-provided-in-46-18-222,-the-imposition-or execution-of-the-first-2-years-of-a-sentence-of-imprisonment imposed-under-the-following-sections-may-not-be-deferred--or suspended:--45-5-103,--45-5-202(3)--relating--to--aggravated assault,--45-5-302(2),-45-5-303(2),-45-5-401(2),-45-5-503(2) and-(3),-45-9-101(2),--(3),--and--(5)(d),--45-9-102(3),--and 45-9-103(2).

(5)--Except--as-provided-in-46-18-222,-the-imposition-or execution--of--the--first--10--years--of---a---sentence---of imprisonment--imposed--under-45-5-102-may-not-be-deferred-or suspended.

(6)--Except-as--provided--in--46-18-222,--imposition--of sentence-in-a-felony-case-may-not-be-deferred-in-the-case-of a--defendant--who--has-been-convicted-of-a-felony-on-a-prior occasion,--whether--or--not--the---sentence---was---imposed, imposition-of-the-sentence-was-deferred,-or-execution-of-the sentence-was-suspended.

(7)--If--the--victim--was--less--than--16-years-old,-the imposition-or-execution-of-the-first-30-days-of--a--sentence of---imprisonment---imposed---under--45-5-502(3),--45-5-503,

45-5-504,-45-5-505,-or--45-5-507--may--not--be--deferred--or suspended.--Section-46-18-222-does-not-apply-to-the-first-30 days-of-such-imprisonment.

(8)--In-imposing-a-sentence-on-a-defendant-convicted--of a--sexual-offense-as-defined-in-46-23-502,-the-court-may-not waive-the-registration-requirement--provided--in--46-18-254, 46-18-255,-and-Title-46,-chapter-23,-part-5.

(9)--A--person-convicted-of-a-sexual-offense,-as-defined in-46-23-502,-and-sentenced-to--imprisonment--in--the--state prison-shall-enroll-in-the-educational-phase-of-the-prison's sexual-offender-program."

Section-15.--Section-46-23-502,-MCA,-is-amended-to-read:

"46-23-502.--Definitions.-----As---used---in---46-18-254, 46-18-255,-and-this-part,-the-following-definitions-apply:

(1)--"Department"-means-the-department--of--institutions provided-for-in-Title-2,-chapter-15,-part-23.

(2)--"Sexual--offender"--means--a--person--who--has-been convicted-of-a-sexual-offense.

(3)--"Sexual-offense"-means:

(a)--any-violation-of-45-5-502(3),--45-5-503,--45-5-505, 45-5-507--(unless--the--act--occurred-between-two-consenting persons-16-years-of-age-or-older),-or-45-5-625,-or

(b)--any-violation-of-a-law--of--another--state--or--the federal--government--reasonably--equivalent--to--a-violation listed-in-subsection-(3)(a)."

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Section 11. Section 50-20-109, MCA, is amended to read:

"50-20-109. Control of practice of abortion. (1) No abortion may be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

(c) after viability of the fetus, unless in appropriate medical judgment the abortion is necessary to preserve the life or health of the mother.

(2) An abortion under subsection (1)(c) may only be performed if:

(a) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by him setting forth in detail the facts upon which he relies in making such judgment; and

(b) two other licensed physicians have first examined the patient and concurred in writing with such judgment. The foregoing certification and concurrence is not required if a licensed physician certifies the abortion is necessary to preserve the life of the mother.

(3) The timing and procedure used in performing an abortion under subsection (1)(c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 45-2-101(37). The fetus may be intentionally endangered

or destroyed only if necessary to preserve the life or health of the mother.

(4) No physician, facility, or other person or agency shall engage in solicitation, advertising, or other form of communication having the purpose of inviting, inducing, or attracting any person to come to such physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(5) Violation of subsections (1), (2), and (3) of this section is a felony. Violation of subsection (4) of this section is a misdemeanor."

Section 12. Section 61-5-405, MCA, is amended to read:

"61-5-405. Offenses furnishing ground for suspension or revocation of license. (1) Items enumerated in Article IV(1), subsections (a), (b), (c), and (d) of 61-5-401 refer specifically to 45-5-103, 45-5-104, 61-8-401, 45-2-101(21)(20), and 61-7-103, respectively.

(2) In addition to convictions mentioned above the department, for the purpose of suspension, revocation, or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported as it would if such conduct had occurred in this state for:

(a) convictions of perjury or the making of a false affidavit relating to the ownership or operation of a motor vehicle (61-5-303), and

~~(b)--three-convictions--of--reckless--driving--committed within-a-period-of-12-months-(61-8-301).~~"

~~NEW-SECTION.--Section-18.--Repealer.--Section--45-5-505, MCA,-is-repealed.~~

~~SECTION-13.--SECTION-45-5-505,-MCA,-IS-AMENDED-TO-READ:~~

~~"45-5-505.--Deviate--sexual--conduct--Bestiality.--(1)-A person-who-knowingly-engages--in--deviate--sexual--relations~~ bestiality ~~or-who-causes-another-to-engage-in-deviate-sexual relations~~ bestiality ~~commits-the-offense-of-deviate-sexual conduct~~ bestiality.

~~(2)--A-person-convicted-of-the-offense-of-deviate-sexual conduct~~ bestiality ~~shall-be-imprisoned-in-the--state--prison for--any--term--not-to-exceed-10-years-or-be-fined-an-amount not-to-exceed-$50,000,-or-both.~~

~~(3)--A--person--convicted--of--deviate--sexual---conduct without--consent-shall-be-imprisoned-in-the-state-prison-for any-term-not-to-exceed-20-years-or-be-fined-an-amount-not-to exceed-$50,000,--or--both~~ For--purposes--of--this--section, ~~"bestiality"--means--any-form-of-sexual-contact-or-of-sexual intercourse-with-an-animal.~~"

Section 7. Section 45-5-505, MCA, is amended to read:

"45-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both.

(4) THE FACT THAT A PERSON SEEKS TESTING OR RECEIVES TREATMENT FOR THE HIV-RELATED VIRUS OR ANOTHER SEXUALLY TRANSMITTED DISEASE MAY NOT BE USED AS A BASIS FOR A PROSECUTION UNDER THIS SECTION AND IS NOT ADMISSIBLE IN EVIDENCE IN A PROSECUTION UNDER THIS SECTION."

NEW SECTION. **SECTION 8.** COORDINATION. THE AMENDMENT IN SECTION 1, CHAPTER 218, LAWS OF 1991, INSERTING SUBSECTION (2)(B) OF 45-5-501 IS VOID.

NEW SECTION. **Section 9.** Effective date. [This act] is effective on passage and approval.

-End-